United States Court of Appeals for the District of Columbia Circuit



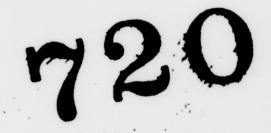
TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

APRIL TERM, 1910.

No. 2135.



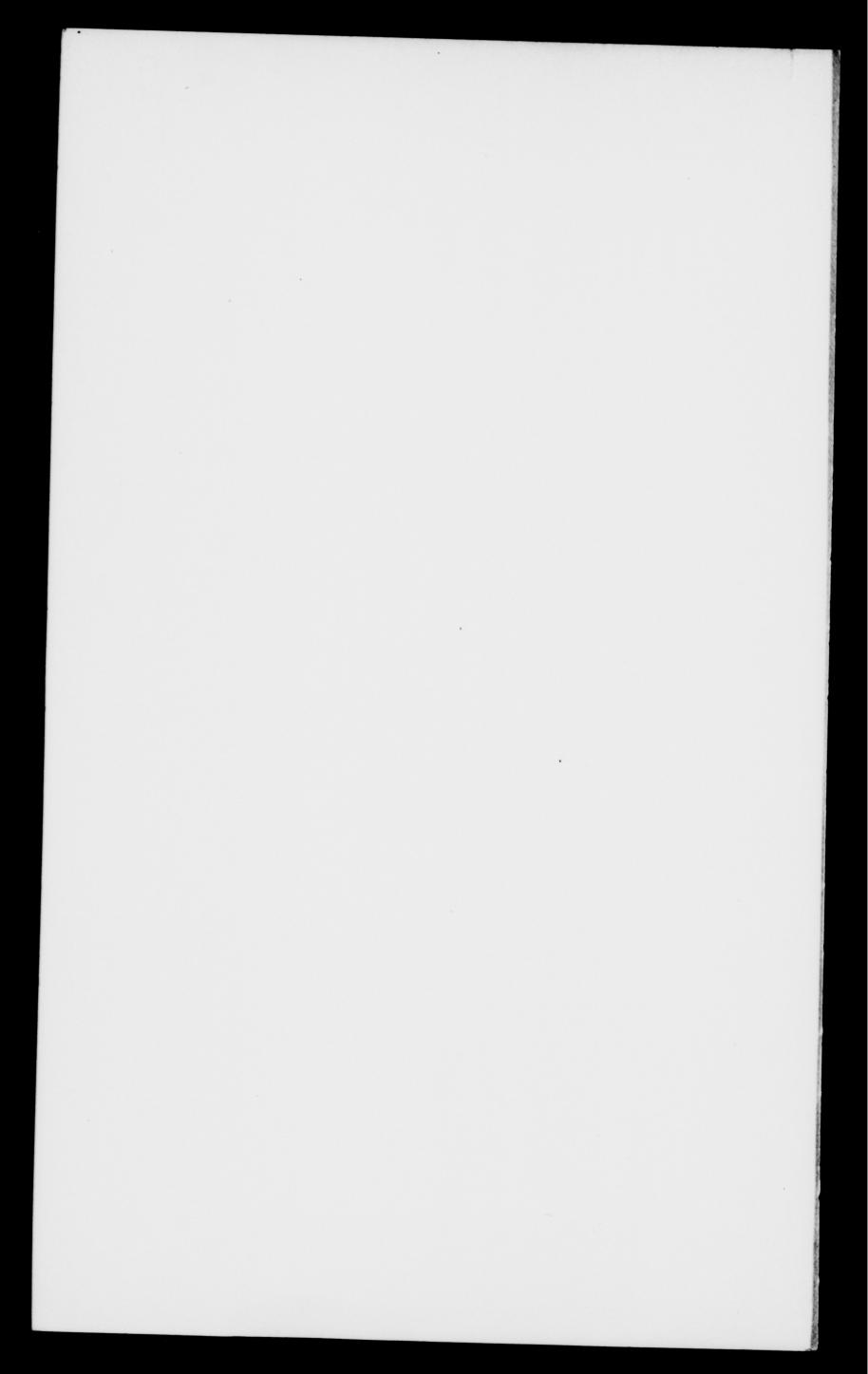
LUCY A. CUNNINGHAM, JAMES CUNNINGHAM, CATHERINE R. CONNER, JOHN W. CONNER, GEORGE W. NICHOLS, FRANCES S. NICHOLS, AND E. MARSHALL NICHOLS AND ALLEN G. NICHOLS, INFANTS, APPELLANTS,

vs.

JAMES H. TAYLOR, EXECUTOR AND TRUSTEE; LEMUEL TONER ERGOOD, AND ANNA MAY RUPPERT, INFANT, BY JAMES A. TOOMEY, HER NEXT FRIEND.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED MARCH 15, 1910.



COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

APRIL TERM, 1910.

No. 2135.

LUCY A. CUNNINGHAM, JAMES CUNNINGHAM, KATH-ERINE R. CONNER, JOHN W. CONNER, FRANCES S. NICHOLS, E. MARSHALL NICHOLS, AND ALLEN G. NICHOLS, BY THEIR GUARDIAN AD LITEM, FRANCES E. NICHOLS, APPELLANTS,

vs.

JAMES H. TAYLOR, EXECUTOR AND TRUSTEE; LEMUEL TONER ERGOOD, AND ANNA MAY RUPPERT, INFANT, BY JAMES A. TOOMEY, HER NEXT FRIEND, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 2135.

LUCY A. CUNNINGHAM et al., Appellants,

VS.

JAMES H. TAYLOR, &c., et al.

Supreme Court of the District of Columbia.

Equity. No. 27954.

Original Bill.

James H. Taylor, Executor and Trustee; Lemuel Toner Ergood, and Anna May Ruppert, Infant, by James A. Toomey, Her Next Friend, Complainants,

VS.

Lucy A. Cunningham, James Cunningham, Catherine R. Conner, John W. Conner, George W. Nichols, Frances S. Nichols, and E. Marshall Nichols and Allen G. Nichols, Infants, Defendants;

and

Cross-Bill.

LUCY A. CUNNINGHAM and CATHERINE R. CONNER, Complainants, vs.

James H. Taylor, Executor and Trustee; Lemuel Toner Ergood, Anna May Ruppert, Infant; George W. Nichols, Frances S. Nichols, E. Marshall Nichols, Infant, and Allen G. Nichols, Infant, Defendants.

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to-wit:—

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1

Bill of Complaint.

Filed Jul. 24, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

James H. Taylor, Executor and Trustee; Lemuel Toner Ergood, and Anna May Ruppert, Infant, by James A. Toomey, Her Next Friend, Plaintiffs,

VS.

Lucy A. Cunningham, James Cunningham, Katherine R. Conner, John W. Conner, George W. Nichols, Frances S. Nichols, E. Marshall Nichols, and Allen G. Nichols, Infants, Defendants.

To the Honorable the Justices holding said Court:

The complainant, James H. Taylor, executor and trustee, re-

spectfully shows as follows:

1. The complainant, James H. Taylor, is a citizen of the United States and a resident of the District of Columbia, and brings this suit as executor and trustee of the will and codicil of Susan Poulton, deceased, and as trustee in a certain Equity Cause in the Supreme Court of the District of Columbia, known as Equity Number 27,212. The complainant Lemuel Toner Ergood is a citizen of the United States and a resident of Denver, Colorado. The complainant Anna May Ruppert is a citizen of the United States and a resident of the District of Columbia; said complainants, Lemuel Toner Ergood, and Anna May Ruppert are the sole heirs at law and devisees of one

Susan Poulton, deceased, hereinafter referred to. Said Anna

2 May Ruppert is an infant 18 years of age.

2. The defendants, Lucy A. Cunningham, James Cunningham, Catherine R. Conner, John W. Conner, Frances S. Nichols, wife of defendant George W. Nichols, E. Marshall Nichols and Allen G. Nichols, are all residents of the District of Columbia. The defendant, George W. Nichols' residence is unknown to the complainant, but according to the best of complainants' information and belief said George W. Nichols went to Panama about a year prior to the filing of this bill of complaint and has not recently been heard from. The defendants E. Marshall Nichols and Allen G. Nichols are children of said George W. Nichols, and are infants under twenty-one years of age; that said defendants are sued as the heirs at law of George M. Nichols and Catherine Nichols, his wife as will hereafter more fully appear.

3. That one Susan Poulton formerly Susan Fitzgerald, wife of Edward Fitzgerald, departed this life on the 7th day of September, 1903, in the city of Washington and District of Columbia, leaving a last will and testament and codicil, by which she devised all her property, real and personal and mixed to the complainant, James H. Taylor, as executor and trustee in trust after paying a certain

legacy in the amount of five hundred dollars (\$500.00) to hold said property with full power to sell and to apply the income and profits therefrom to the maintenance and support of one Catherine Ruppert during her life, said Catherine Ruppert being a daughter of said Susan Poulton, deceased, and upon the death of said Catherine Ruppert, to divide said property equally between Annie May Ruppert

and Lemuel Toner Ergood, grand children of said Susan 3 Poulton, deceased, and said James H. Taylor was named as executor and trustee in said will and codicil, which said will and codicil were duly admitted to probate and record in the Supreme Court of the District of Columbia holding a Probate Court and letters testamentary under said will and codicil were granted by said Court to the complainant, James H. Taylor who qualified as executor and trustee of the last will and codicil of said Susan Poulton, deceased, and assumed the discharge of the duties reposed in him by said will and codicil all of which will more fully appear by the duly certified copy of said will and testament and codicil of Susan Poulton, deceased, and of the order of the Supreme Court of the District of Columbia, admitting said will and testament and codicil of said Susan Poulton, deceased, to probate and record, and granting letters testamentary to the complainant James H. Taylor, which are filed herewith and marked "Complainant's Exhibit A" and are prayed to be taken as a part of this bill of complaint.

4. That the said Catherine Ruppert daughter of said Susan Poulton, deceased, who under the provisions of said will was entitled to the income and profits from the estate of said Susan Poulton, deceased, during the life of said Catherine Ruppert, departed this life in the city of Washington and District of Columbia on the 5th day of April 1907, and it then became the duty of the complainant as executor and trustee of the will and codicil of said Susan Poulton, deceased to divide the estate of the said Susan Poulton, deceased,

between the said Annie May Ruppert and Lemuel Toner Ergood, grand children of said Susan Poulton deceased, in accordance with the terms of the will and codicil of said

Susan Poulton, deceased.

5. That on the 8th day of July 1907 complainant as executor and trustee under the will and codicil of Susan Poulton, deceased, filed a bill in the Supreme Court of the District of Columbia, against the said Annie May Ruppert and Lemuel Toner Ergood, said suit being numbered Equity Numbered 27,212, for the purpose of affecting division of the estate of said Susan Poulton, deceased, between the said Annie May Ruppert and Lemuel Toner Ergood, and by a decree passed in said Equity Cause Numbered 27,212, by the Supreme Court of the District of Columbia on the 12th day of August, 1907, the said Supreme Court of the District of Columbia decreed that the said Annie May Ruppert and Lemuel Toner Ergood were entitled to have a partition of the estate of the said Susan Poulton, deceased, and that the land and real estate described in said Equity Cause numbered 27,212, could not be divided in kind without loss or injury, and directed that the same should be sold by the complainant as trustee named for that purpose in said Equity cause

numbered 27,212, as will more fully appear from a certified copy of the said decree of the Supreme Court of the District of Columbia passed in said Equity Cause Numbered 27,212, which is filed herewith and marked "Exhibit D" and is prayed to be taken as a part hereof.

6. That in pursuance of said decree passed in said Equity Case numbered 27,212, and by virtue of the authority in him vested as executor and trustee of the will and testament of Sugar

as executor and trustee of the will and testament of Susan Poulton, deceased, the complainant, James H. Taylor, ad-5 vertised for sale all the land and real estate described in said decree and actually sold all the said real estate excepting the following described parcels situated in the city of Washington and District of Columbia, to wit; The west part of lot five (5) in square three hundred and eighty-five (385) beginning at a point twenty-two (22) feet nine (9) inches from the southeast corner of said lot five (5) and running southwest along Maryland Avenue ten (10) feet thence northwesterly and at right angles with said Avenue sixty (60) feet, east ten (10) feet, thence southeasterly to said Avenue. and beginning, being the west part of lot A in recorded subdivision of lots in said square and parts of lot five (5) and eight (8) in said square three hundred and eighty-five (385), beginning at southeastern corner of said lot five (5), thence southwesterly along Maryland Avenue thirty-two (32) feet, nine (9) inches, thence northwesterly and at right angles with said Avenue sixty-nine (69) feet, six (6) inches, thence north to south C Street, thence east along said Street twenty-six (26) feet, six and one half (61/2) inches to the northeastern corner of said lot eight (8), thence south thirty-nine (39) feet, eight (8) inches, thence to the said Avenue, and beginning, being lot A in subdivision of lots in said square, excepting from said lot A that part of said lot A beginning with the northwest corner of said lot A and running south on the east line of a six (6)f oot alley fifty-four and fifty hundredths (54.50) feet, northeasterly thirty and fifty hundredths (30.50) feet to a point on the eastern line of said lot A forty-nine and seventy-five hundredths feet (49.75) on said line from C street northwesterly 6

with said line ten and eight hundredths (10.08) feet, north with said line thirty-nine and seventeen hundredths (39.17) feet to said C street, thence with said south line of said street west twenty-six and fifty-four hundredths (26.54) feet to the beginning, said excepted and unsold property being also described as follows:

Part of lot A in George C. Hercus' subdivision in Square 385 as per plat recorded in Book W. F. page 140 Surveyor's Office, D. C., described as follows: Beginning for the same at the southeast corner of said lot and running thence southwesterly along the north line of Maryland Avenue 32.75 feet, thence northwestwardly at right angles to said Avenue 69.50 feet, thence North 8.46 feet, thence northeastwardly 30.50 feet, to a point in the east line of said lot 72.59 feet northwestwardly from the point of beginning, and thence southeastwardly along said east line of said lot 72.59 feet to said Avenue and the point of beginning.

That said excepted and unsold land and real estate particularly

described in this paragraph in this bill of complaint was advertised for sale by said complainant with the statement that the title to the same was good in fee simple or there would be no sale, and in good faith said complainant offered said property for sale with a good fee simple title at public auction to the highest bidder, but not more than the sum of twenty-three hundred dollars (\$2300) was bid for said property at public auction, and the same was therefore withdrawn, but very shortly after said attempt to sell said property at public auction the same was therefore withdrawn, but very shortly after said attempt to sell said property at

public auction the complainant received an offer at private sale of twenty-eight hundred dollars (\$2800) for said property and undertook and agreed to sell the same to said purchaser as a good fee simple title under the authority of an order of the Supreme Court of the District of Columbia passed in said Equity Cause No. 27212 for said sum of twenty-eight hundred dollars (\$2800), but upon an examination of the title by the Home Title Company of the District of Columbia for and on behalf of said proposed purchaser a technical defect in the title to said land and real estate was disclosed which caused said Title Company to refuse to certify that the title to said land and real estate was good in fee simple, and thereupon the said proposed purchaser declined to complete his said purchase and refused to accept said property.

7. The said technical defect in the title to said property is the omission in the habendum clauses of the deeds conveying said property to said Susan Poulton, deceased, of the word, "heirs" in describing the estate to be taken under said deeds by the said Susan Poulton, deceased then Susan Fitzgerald. That said Susan Poulton at the time when she purchased said property, was a married woman and she was then known as Susan Fitzgerald, and according to the best of the information and belief of the complainants the said Susan Poulton, deceased, at the time when she required said property desired to avoid any question as to her husband's right or control over the said property, and therefore she took title through a trustee for the purpose of preventing her husband from having any

right or control during his life over said property; that at the 8 time when said Susan Poulton, deceased, acquired said property the "Married Woman's Act of 1869" had been passed a few months prior to the purchase of said property by said Susan Poulton, deceased, and the construction and operation of said Act was not then so certain as to prevent Susan Poulton, deceased, from taking title without the precautions that were necessary before the passage of said Act in order to defeat her husband's right and control of said property during his life, and she accordingly took said title through a trustee which said trust on the death of her husband, Edward Fitzgerald, would become a mere dry trust, and a full and complete title to the property would then vest in the said Susan Poulton, deceased, and pass to her heirs at law or devisees in fee simple under the well known rules of equity applicable to such That said Susan Poulton deceased, acquired said described property by two deeds both made and executed in due form of law by George M. Nichols and Catherine Nichols, his wife. The first of said deeds was dated November 19, 1869, and was duly recorded

on the 22nd day of November, 1869, in Liber No. 601, at folio 442, et seq., one of the land records of the District of Columbia, and the second of said deeds was dated the 19th day of May 1881, and recorded on the 23 day of May 1881, in Liber No. 991, folio 13, et seq., one of the land records of said District of Columbia, said second deed having been executed to correct an omission of part of lot eight (8) in square three hundred and eighty-five (385) which should have been included according to the agreement of the parties in the first deed; that in both deeds said property is said

to be conveyed to the party of the second part (as trustee for 9 Susan Poulton, deceased,) "his heirs and assigns forever for the sole use and benefit and behoof of the said Susan Fitzgerald, and not subject to the control and disposal of her husband or liable for his debts" and the habendum clause in both of said deeds reads as follows: "To have and to hold the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns, as trustee as aforesaid of the said Susan Fitzgerald, to her sole use, benefit and behoof forever," That neither of said deeds shows any intention or agreement and there was none, of reserving any interest in said land and real estate to the grantors or their heirs or assigns, but the language of the scrivener defectively expressing by its omission of the word "heirs" in describing the estate to be taken by Susan Poulton, deceased, the real agreement of the parties in interest in said deeds, shows that he was attempting to draw a conveyance vesting the fee simple title to said property, in Susan Poulton, deceased, through a trustee to protect said property from the control of the husband of the said Susan Poulton, deceased, and from liability for his debts, and except to one familiar with the technicalities of the law, it would seem to clearly accomplish that purpose. Said deeds bear evidence on their face of having followed printed forms and complainants aver that the mistake of the scrivener in omitting the word "heirs" in describing the interest and estate in said property of said Susan Poulton, deceased, was unwittingly made by the scrivener, who drew said deeds and

that the granters in said deeds and the trustee named therein 10 for said Susan Poulton, deceased, and said Susan Poulton, deceased agreed and intended that the deeds to be executed in conveying said property should pass the fee simple title to said Susan Poulton, deceased, through a trustee who during the life of the husband of said Susan Poulton, deceased, namely Edward Fitzgerald, would protect said property as expressed in the deed, from his control and from liability for his debts, and that the scrivener who drew said deeds attempted to carry out said agreement and intention and unwittingly thought he had done so, although by the omission of the word "heirs" in the habendum clauses of said deed in describing the estate to be taken by Susan Poulton, deceased, he failed to carry out the agreement and intention of said grantors in said deeds and of the said trustee for Susan Poulton, deceased, and of Susan Poulton, deceased, and that said mistake was mutual and common to all the parties referred to in said deeds or connected with the preparation and execution of said deeds; that duly certified copies of

said deeds are filed herewith marked complainant's exhibits E and

F and are prayed to be taken as a part hereof.

8. The complainants aver that the agreement and intention of the grantors in said deeds and of said Susan Poulton, deceased, and of the trustee named in said deed was by means of said deeds to vest a fee simple estate in the property described in said deeds in said Susan Poulton, deceased, though title was to be taken by the trustee named in said deeds to protect said property during the life of the husband of Susan Poulton, deceased, namely Edward Fitz-

11 gerald from control on his part or from liability for his debts when after the death of said Edward Fitzgerald, the trust would become a mere dry trust, and the whole fee simple estate, both legal and equitable, in said property would vest by operation of law in said Susan Poulton, deceased. That the consideration for the sale of said property by the grantors to said Susan Poulton deceased, was the sum of four thousand dollars (\$4,000) which was the full value for the whole fee simple title to said property at the time when the same was acquired by said Susan Poulton, deceased, and said purchase price of four thousand dollars (\$4000) was actually paid by the said Susan Poulton deceased, to the grantors named in said deeds and they received the money and neither said grantors named in said deed nor said Susan Poulton, deceased, nor the trustee named in said deed, nor anyone else, so far as complainants are advised, ever entertained any doubt that the fee simple title to the property described in said deed had been passed by them to said Susan Poulton, deceased, until after the sale made by complainant, James H. Taylor, of the said property under the belief that he could pass the fee simple title thereto to Annie C. and William B. Chisholm for the sum of twenty-eight hundred dollars (\$2800) when on the discovery by the Title Company of said technical defect in said deeds the said Annie C. and William B. Chisholm refused to complete his purchase or accept said property.

9. That from the 19th day of November, 1869 until the — day of —— the date of the death of Edward Fitzgerald, hus-

band of said Susan Poulton, dceased the said Susan Poulton, 12 deceased, and the trustees holding for and with her under said deeds, were in the actual, exclusive, open and notorious and continuous possession of the land and real estate described in said deeds claiming to hold the complete fee simple in said land and real estate as against the grantor named in said deeds and all other persons and from the death of said Edward Fitzgerald as aforesaid, up to the 7th day of September, 1903, the date of the death of said Susan Poulton, deceased, the said Susan Poulton, deceased, was in the actual, exclusive, open, and notorious and continuous possession of the land and real estate described in said deeds claiming to own the fee simple title thereto as against the grantors in said deeds and all other persons, and from the date of the death of said Susan Poulton, deceased, to the filing of this bill of complaint, the complainant, James H. Taylor, as executor and trustee under the last will and codicil of Susan Poulton, deceased, and the devisees named in said last will and codicil of Susan Poulton, deceased, to whom the beneficial interest

in the land and real estate described in said deeds was devised by said Susan Poulton deceased have been in the actual, exclusive, open and notorious and continuous possession of said land and real estate described in said deeds claiming to be the fee simple owners of the same as against the grantors named in said deeds and all other persons; that although the grantors in said deeds, the ancestors of the defendants, were paid the full market price and value for said land and real estate for the fee simple title to the same when it was acquired by the said Susan Poulton, deceased, and until the

discovery of the technical defect in said title by the Title company aforesaid, no one else, least of all the defendants herein, had any idea or doubt but that said Susan Poulton, deceased, was the full and complete owner of the fee simple title to said land and real estate described in said deeds, yet nevertheless the said defendants attempting wrongfully to gain an advantage for themselves and to wrest said property from the grand children of said Susan Poulton, deceased, to whom she devised it, and died in the belief that she was validly devising it, have refused to comply with the requests which have been made to such of them as could be reached by the complainants to execute quit claim deeds to correct the mistake in said deeds as is hereinafter set forth.

10. That the complainants aver that George M. Nichols, one of the grantors in said deeds departed this life intestate in the city of Washington, D. C. on or about the 2nd day of November, 1885, and that Catherine Nichols, his wife, the other grantor named in said deeds, departed this life intestate on or about the — day of November, 1892. That the heirs at law of said George M. Nichols and Catherine Nichols are the defendants herein, namely, Lucy A. Cunningham, who is a daughter of said grantors in said deed Catherine R. Conner, who is a daughter of the grantor named in said deeds; Frances S. Nichols wife of defendant, George W. Nichols and George W. Nichols, who is a son of the grantors named in said deeds; that complainants aver that all said heirs at law, excepting the said George W. Nichols, are living, but the complainants, after diligent inquiry, are unable to ascertain whether the defendant George

W. Nichols, is living or not. The complainants have been advised that the said George W. Nichols left the District of Columbia more than a year prior to the filing of this bill of complaint and that he has not recently been heard from, and that his relatives and no other persons from whom the complainants can obtain information, know whether said George W. Nichols is living or dead, and therefore in order that all persons who may have any interest in the subject matter of this suit may be brought in and may be made parties thereto the complainants have made the children of said George W. Nichols, namely E. Marshall Nichols, and Allen G. Nichols, parties to this suit, to the end that Guardians ad litem may be appointed to appear, answer and defend to this bill of complaint.

11. That upon the discovery on or about the 15th day of December, 1907 of said technical defect in said deeds the complainants immediately and diligently sought to have said defect corrected by the defendants herein and negotiations were entered into with that purpose in view by the complainants. A representative as the com-

plainants were advised, and therefore aver, negotiated with the complainants for some time with a view of furnishing quit claim deeds to cure the defect of title and mistake set forth in this bill of complaint for a nominal consideration of one hundred dollars (\$100) or one hundred and fifty dollars (\$150), but before said negotiations were concluded, they were broken off by the defendants and complainants were advised that the defendants had secured other attorneys and would not voluntarily correct said mistake set out in this

bill of complaint; that the attempt on the part of the defendants to take advantage of the technical defect and omis-15 sion of the word "heirs" where it is omitted in said deeds as hereinabove set forth in view of the language of said deeds and the well known character of the agreement and purchase of said land and real estate by the said Susan Poulton, deceased, from the grantors in said deeds, and that the ancestors of the defendants received the full consideration and value for the fee simple title to said land and real estate described in said two deeds is against good conscience and could it succeed would be an outrageous violation of the agreement and purchase of said property by the said Susan Poulton, deceased, and of her rights as a consequence of said purchase, and would, through a mere technical defect, wrongfully allow the defendants to wrest from the grand children of the said Susan Poulton, deceased, namely, the defendants, Annie May Ruppert and Lemuel Toner Ergood, the land and real estate which the said Susan Poulton, deceased, purchased, and paid full value for in good faith from the ancestors of the defendants and to which she died in the belief that she was passing a good title in fee simple to her said grand children and complainants are advised that though they are without an adequate remedy at law that they are entitled to invoke the aid of this Honorable Court to correct the said mistake in the said deeds and to reform said deeds so as to make them express the real agreement and intention of the grantors named in said deeds, and of the said Susan Poulton, deceased, and the trustee named in said deeds and pass the fee simple title to said land and

real estate to the complainants.

The premises considered, complainants pray as follows:

1. That writs of subpœna may issue out of the Clerk's Office of this Honorable Court directed to the defendants, Lucy A. Cunningham and James Cunningham, her husband, Catherine Conner and John W. Conner, her husband, Frances S. Nichols, George W. Nichols, E. Marshall and Allen G. Nichols, commanding them and each of them to appear in this Honorable Court on a day to be therein named and to make answer, but not under oath, to the matters and things alleged in this bill of complaint, an oath to the answers of said defendants is hereby expressed waived as to each and all of said defendants.

2. That a guardian ad litem may be appointed to appear, answer and defend in this cause for the infant defendants, E. Marshall

Nichols and Allen G. Nichols.

3. That a decree may be passed in this cause correcting said mistake in said deeds and that said deeds may be reformed and corrected so as to make the same pass a fee simple title in and to the

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land and real estate described in said deeds to and for the use of said Susan Poulton, deceased, and that the fee simple title to the land and real estate described in said deeds may be decreed to be now vested in the complainant James H. Taylor, as executor and trustee under the Will and codicil of said Susan Poulton, deceased.

4. That a decree may be passed in this cause vesting the fee simple title to the land and real estate particularly described in the sixth paragraph of this bill of complaint in James H.

Taylor, as executor and trustee under the last Will and codicil of Susan Poulton, deceased, for the purpose of the trusts declared and set up by said last will and codicil of said Susan Poulton, deceased, and that the defendants or some one appointed to act for them may be required to execute all such necessary quit claim deeds or other conveyances as may be necessary to vest the fee simple title to said land and real estate particularly described in the sixth paragraph of this bill of complaint in James H. Taylor, as executor and trustee of the last Will and Codicil of Susan Poulton, deceased, for the purpose of carrying out the trusts set up and declared in said last Will and codicil of said Susan Poulton, deceased.

5. And for such other and further relief the premises considered as may be agreeable to equity and good conscience.

JAMES H. TAYLOR.

PERCIVAL M. BROWN, CHAS W. CLAGETT, Solicitors for Plaintiffs.

District of Columbia, ss:

I, James H. Taylor, do solemnly swear that I have heard read the foregoing bill of complaint by me subscribed and I know the contents thereof; that the facts therein stated on my personal knowledge are true and those stated on information and belief I believe to be true.

JAMES H. TAYLOR.

Subscribed and sworn to before me this 20th day of July, A. D. 1908.

[SEAL.]

JENNIE M. RYAN, Notary Public.

18 COMPLAINANT'S EXHIBIT "A".

I, Susan Poulton, being of sound and disposing mind, do hereby make, declare and publish this as and for my last will and testament:

I give, devise and bequeath to my executor hereinafter named and appointed all my property real, personal and mixed, of every kind and wherever situated, with full power to sell and convert the same and to reinvest the proceeds whenever and in such manner as he may see fit; to have and to hold the same, and the proceeds thereof, in and upon the trust to apply the income and profit thereof to the maintenance and support of my daughter Cathine Ruppert so long as she may live, and upon her death to devide the remainder equally between my grandchildren Annie May Ruppert and Lemuel Toner Ergood. And in the event of the death of either of my said grandchildren before such division is made, leaving issue, the said issue shall take the parent's portion.

And I hereby direct my said executor to pay my husband William F. Poulton, if he survive me, the sum of Five hundred dollars (\$500.00) the payment thereof to be made as soon as it conveniently may be after my death, and I also direct my said executor to set apart a sufficient sum from my estate to be a fund to provide

for the care of my lot in Mount Olivet Cemetery.

And I hereby appoint James H. Taylor the executor of this my will and trustee of my said estate, with full power of sale as and when he may deem it advisable or necessary and to do all other

acts which may be necessary in carrying out the trust hereby reposed in him and the provisions of this will. The purchasers of said property being hereby expressly relieved from liability to see to the application of purchase money.

Signed, sealed, declared and published at Washington, in the Dis-

trict of Columbia, this 19th day of December, 1902.

SUSAN POULTON. SUSAN POULTON.

Signed, sealed, declared and published by the said Susan Poulton, as and for her last will and testament, in the presence of us, who at her request and in her presence, and in the presence of each other have subscribed our names as witnesses this 19th day of December, 1902.

ALFRED B. BRIGGS. J. ROBERT SOMMERVILLE. WILLIAM J. BROWN.

I, Susan Poulton, being of sound and disposing mind do hereby make, declare and publish this as and for a codicil to my last will and testament.

I desire, and do hereby so order and direct, that the portion of my estate which by my said will is given and devised to my granddaughter Annie May Ruppert, shall be held in trust for her and for her maintenance and education, by my executor James H. Taylor, until my said granddaughter shall reach the age of twenty-one

years, when she shall take the same absolutely. And for this purpose, I hereby give, devise and bequeath to my said executor my said granddaughter's portion of my estate in trust to hold the same for her and to apply the income thereof, and the principal also if necessary, for her support and education until she reaches the age of twenty-one years, when the said property or proceeds thereof shall be transferred to her absolutely and unconditionally: my said executor to have full power and authority to take possession of and to hold the said property and to sell and

dispose of any or all of the same as and when he may see fit for the purposes of paying the debts of my estate, of supporting and educating my said granddaughter, or for reinvestment, the purchaser or purchasers thereof being hereby expressly relieved from liability to see to the application of the purchase money. In all other respects I hereby confirm my said last will and testament.

In testimony whereof I have hereunto set my hand and seal

this twenty-fourth day of March, A. D. 1903.

SUSAN POULTON.

Signed, sealed, declared and published by the said Susan Poulton, as and for a Codicil to her last will and testament in the presence of us, who at her request and in her presence and in the presence of each other have subscribed our names as witnesses hereto.

MRS. LILLIAN LYNN. JON BKN. DUDLEY T. HASSAN.

21 In the Supreme Court of the District of Columbia.

No. 11707. Admin.

In re Estate of Susan Poulton, Deceased.

Upon consideration of the petition filed herein, and it appearing to the Court that the will of the said Susan Poulton, bearing date on the 19th day of December, 1902, and a codicil thereto bearing date on the 24th day of March, 1903, have been duly filed and the execution thereof proved by the testimony under oath of the subscribing witnesses thereto, and no objection having been signified to the Court, it is this 1st day of October, 1903, ordered adjudged and decreed that the will and codicil be, and the same are hereby admitted to probate and record, and that letters testamentary issue to James H. Taylor, the executor in said will and codicil named, upon his giving bond in the penal sum of thirty thousand dollars conditioned for the faithful discharge of this trust.

HARRY M. CLABAUGH, Chief Justice.

Supreme Court of the District of Columbia, Holding Probate Court.

DISTRICT OF COLUMBIA, To wit:

I, Wm. C. Taylor, Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court, do hereby certify that the foregoing are true copies of the original will and codicil of Susan Poulton, deceased, and of the decree of said Court admitting the same to probate and record, as filed and recorded in the office of the Register of Wills for the District of Columbia, Clerk of the Probate Court aforesaid,

I further certify, that I have compared the foregoing copies with the original records in said office and find them to be full, true and correct transcripts thereof.

Witness my hand and the seal of the said Probate Court, this 19th

day of May, A. D., 1908.

[SEAL.]

WM. C. TAYLOR,

Deputy Register of Wills for the District of Columbia, Clerk of the Probate Court.

23

COMPLAINANT'S EXHIBIT "D."

Filed August 12, 1907. J. R. Young, Clerk.

Equity. No. 27212.

James H. Taylor, Executor, etc., v. Anna May Ruppert et al.

This cause came on to be heard on the pleadings and proof, and it is thereupon and upon consideration thereof this 12th day of August, 1907, adjudged, ordered and decreed:

That the defendants are entitled to have a partition of the land and real estate described in this bill of complaint, and that the said land and real estate can not be divided in kind without loss or injury to the said defendants and it is therefore ordered

That the said land and real estate described in the said bill of complaint be sold, the same being all situated in the City of Washington and District of Columbia and described as follows: the west part of lot three (3) in square two hundred and sixty three (263) fronting eighteen (18) feet on south "C" Street and running back the same width by the depth of said lot; part of lot three (3) in square two hundred and sixty-three (263), being the east thirty (30) feet four (4) inches of said lot by the depth thereof; the west one-half (½) of lot four (4) in square two hundred and sixty three (263), beginning at southwest corner of said lot four (4) and running thence north along dividing line between lots four and

five, seventy-one (71) feet, thence east eighteen (18) feet, four inches, thence north twenty (20) feet, thence east five (5) feet ten (10) inches, thence south along dividing line between east and west one-half of said lot four (4), ninety-one (91) feet to "C" Street south, thence along line of said street twenty four feet (24) two (2) inches to beginning. The west part of lot five (5) in square three hundred and eighty-five (385), beginning at a point twenty-two (22) feet, nine (9) inches from southeastern corner of said lot five (5) and running southwesterly along Maryland Avenue ten (10) feet, thence northwesterly and at right angles with said Avenue sixty (60) feet, east ten (10) feet, thence southeasterly to said Avenue and beginning, being west part of lot "A" in recorded subdivision of lots in said square; parts of lots five (5) and eight (8) in square three hundred and eighty-

five (385), beginning at southeastern corner of said lot five (5) thence southwesterly along Maryland Avenue thirty-two (32) feet nine (9) inches, thence northwesterly and at right angles with said Avenue sixty-nine (69) feet six (6) inches, thence north to south "C" Street, thence east along said street twenty-six (26) feet, six and one-half (6½) inches to the northeastern corner of said lot eight (8), thence south thirty-nine (39) feet, eight (8) inches, thence to said Avenue and beginning, being lot "A" in subdivision of lots in said square, excepting from said lot "A" that part of said lot "A" beginning with the northwest corner of said lot "A" and running south on the east line of a six (6) foot alley fifty-four and fifty hundredths (54.50) feet, northeasterly thirty and fifty hundredths (30.50) feet, to a point on the eastern line of said lot "A" forty-nine and seventy-five hundredths feet (49.75) on said line

from C street, northwesterly with said line ten and eight hundredths feet (10.08) north with said line thirty-nine and seventeen hundredths (39.17) feet to said C Street, thence with said south line of said street west twenty-six and fifty-

four hundredths feet (26.54) to the beginning.

The north thirty-one (31) feet front of original lot four (4) and the south thirty-five (35) feet front of original lot five (5) by the depth of said lots in square four hundred and thirty-three (433).

That James H. Taylor be and he is hereby appointed trustee to make said sale, giving bond in the penalty of Twenty thousand dollars. That the advertisement of said sale be made in the Evening Star Newspaper.

It is further ordered:

That the provisions of Equity Rule No. 91 be in all respects complied with.

JOB BARNARD, Justice.

This decree is satisfactory to us.

CHAS. W. CLAGETT,

Solicitor for Complainant.

JAMES A. TOOMEY,

Solicitor for the Defendant Anna May Ruppert and for Otto C. Ruppert, Her Guardian Ad Litem.

PERCIVAL M. BROWN,
Solicitor for the Defendants, Lemuel Toner
Ergood and Jessie Dorothy Ergood.

[SEAL.]

A true Copy.

Test:

J. R. YOUNG, Clerk,
By F. E. CUNNINGHAM,
Ass't Clerk.

26 Answer of Infant Defendants, E. Marshall Nichols and Allen G. Nichols, by Guardian Ad Litem.

Filed Oct. 17, 1908.

In the Supreme Court of the District of Columbia.

Equity Docket, No. 27954.

James H. Taylor, Executor and Trustee, et al., Complainants,

Lucy A. Cunningham et al., Defendants.

These defendants for answer to the bill of complaint herein filed answering by their guardian ad litem says: they are infants under the age of twenty-one years and cannot, therefore, either admit or deny the allegations of the bill but submit their interests in this cause to the protection of the Court.

FRANCES S. NICHOLS,
Guardian Ad Litem for E. Marshall Nichols
and Allen G. Nichols.

DISTRICT OF COLUMBIA, 88:

Frances S. Nichols, being duly sworn upon her oath says: she has read the foregoing answer by her as guardian ad litem for E. Marshall Nichols and Allen G. Nichols subscribed, and knows the contents thereof and the facts therein stated as of personal knowledge are true; those stated as upon information and belief, she believes to be true.

FRANCES S. NICHOLS.

Subscribed and sworn to before me, this 15th day of October, A. D. 1908.

[SEAL.]

FRANCIS C. WEBB,

Notary Public.

Answer of Lucy A. Cunningham et al.

Filed Dec. 9, 1908.

In the Supreme Court of the District of Columbia.

Equity No. 27954. Docket No. 61.

JAMES H. TAYLOR, Executor and Trustee, et al., Complainants,

Lucy A. Cunningham et al., Defendants.

Joint and Separate Answer of the Defendants, Lucy A. Cunningham, James Cunningham, Catherine R. Conner, John W. Conner and Frances S. Nichols to the Bill of Complaint Herein Filed.

These defendants for answer to so much of the bill of complaint herein filed as they are advised it is necessary and material for them to make answer to, say:

(1-5). They admit the allegations of paragraphs one, two, three, four and five.

(6) The- admit the allegations of paragraph six, except the allegation to the effect that only a technical defect in the title of the complainants to the property involved in this cause exists or has been discovered which they expressly deny, and, on the contrary they aver that instead of a defect in the title there is a total lack of any title in or on the part of complainants to

said property.

(7) They admit that the two deeds referred to in paragraph seven were executed and recorded on the dates and in the Libers and folios therein stated and that the quotations from said deeds given in said paragraph are correct. They admit that Susan Fitzgerald, afterwards Susan Poulton, was a married woman at the time of the making of said deeds, but they are not informed as to her motives or reasons or whether in fact she had any special motive or reason, for taking title to the property covered by the deeds, through a trustee, and they demand strict proof of the allegations respecting the same so far as material to their interests. They admit that the word "heirs" is not found in the habendum clause of said deeds but deny that its absence is to be treated as a technical defect in the title of the complainants and on the contrary aver that the effect of said deeds was to convey to said Susan Fitzgerald only a life estate to the property described therein and that the complainants have, therefore, no title thereto. They deny the allegation that neither of said deeds shows any intention or agreement of reserving any interest in said land and real estate to the grantors or their heirs or assigns but aver that as the deeds convey only a life estate, the intention to reserve to the grantors, the reversion in fee, does appear as a matter of law, under the rules for construing deeds, and they further ad-

mit, as a matter of law, that no express language or agreement is or was necessary to the retention, by the grantors in said 29 deeds of such reversion and that the measure of the estate taken by the grantee in said deeds is what was conveyed and not the omission to reserve by express language, anything, on information and belief, they deny the allegation that there was no agreement reserving any interest in said land in the grantors in said deeds or their heirs or assigns, and on the contrary aver, on information and belief, that the intention of the parties to said deeds was that the grantee should take only a life estate which she, in fact did. They submit that the question whether the language of the scrivener shows that he was attempting to draw a conveyance vesting the fee simple title to said property in Susan Poulton, if it be of any materiality, in view of the fact that the deed does not vest such a title, is a question of legal construction for the Court, but they deny that any such attempt does appear from the language of the deed; they deny that the intention of the parties to the deed was defectively expressed by the omission of the word "heirs"; on the contrary they aver, upon information and belief, that the intention of the parties was correctly expressed by the deeds as drawn. They are not advised as to whether said deeds were prepared on printed forms and if it be material they demand strict proof of the allegation of the

bill, to that effect. Upon information and belief they deny that the grantors in said deeds and the trustee named therein and the said Susan Poulton agreed and intended that the deeds to be executed in conveying said property should pass the fee simple title and that the scrivener who drew said deeds attempted to carry

out such intention. They do not know what said scrivener thought he had done but they deny that he in any respect failed to carry out the intention of the parties to the deeds. They deny that there was any mistake in said deeds which was mutual and common to all parties referred to in said deeds or connected with the preparation and execution of them; on the contrary they aver that no mistake was made.

(8) Answering paragraph eight they again deny the allegation repeated in this paragraph, that it was the agreement and intention of the grantors in said deeds the said trustee and the said Susan Poulton to vest by said deeds a fee simple estate in the property described in said Susan Poulton, on the other hand they aver that said deeds, as drawn, correctly expressed the intention of the parties.

They are not advised as to what consideration was paid by said Susan Poulton to the grantors in said deeds and demand strict proof with reference thereto and they aver that if said consideration, was as received in one of said deeds, Four Thousand Dollars, it did not represent the full value of the whole fee simple title to said property at the time the same was acquired by said Susan Poulton.

They are not advised as to whether any of the parties to said deeds or any one else entertained any doubts as to their effect and demand strict proof of the allegation to that effect if it be material. They aver, on information and belief that the grantors in said deeds never

supposed that they conveyed a fee simple title.

(9) Answering paragraph nine they deny that the said Susan Fitzgerald afterwards Susan Poulton or any one 31claiming under her could, during the lifetime of said Susan Poulton, acquire any possession of said property upon which to base a title by adverse possession against the grantors in said deed their heirs or assigns and particularly against these defendants. They ask the same benefit of this objection as if they had demurred to the bill. They deny the allegations repeated in this paragraph that said Susan Fitzgerald paid the full market price and value for said land and they aver that it is immaterial what their knowledge or supposition as to the title of the said Susan Poulton was. They admit that they have declined to execute quitclaim deeds to said land but deny that they have attempted wrongfully to gain an advantage for themselves or to wrest said property from the grandchildren of said Susan Poulton or from any one else and they simply desire to claim their rights under the law and a proper construction of said deeds. They are not informed as to what was the belief said Susan Poulton had when she died, as to the disposition she had made or attempted to make of said property by her will and demand strict proof if it be material, of the allegations on that subject.

(10) They admit the allegations of paragraph ten except that they say Frances S. Nichols is not one of the heirs at law of George

M. Nichols and Catherine Nichols and has no interest in said property except as the wife (or widow) of George W. Nichols. Three of the defendants are named in said paragraphs as Catherine R. Conner, Marshall Nichols and Allen Nichols whereas their names are Catherine R. Conner, E. Marshall Nichols and Allen G.

Nichols and they further aver that while George W. Nichols has not been heard from for some time, they have no reason

to suppose he is dead.

(11) Answering paragraph eleven they admit that they or some of them, were approached with reference to executing quit claims to said property but they deny that they were under any obligation to do so and they aver that they were entirely within their right to consult an attorney or other attorneys and in refusing to surrender for a nominal consideration, valuable property. They again deny that there was only a technical defect in said deeds. They have here-tofore more fully answered this allegation where it is reiterated in other paragraphs of the bill. They deny all the other allegations of this paragraph except that the complainants have no adequate remedy at law and in that particular they aver that the complainants are not entitled to any relief either at law or in equity, in the premises.

Further answering said bill they say that instead of an attempt being made by the defendants to wrong the complainants, the complainants, or some of them, are in possession and enjoyment of property to which the defendants are now, and ever since the death of said Susan Poulton, entitled, and it is their intention to ask this Honorable Court by Cross-bill, to be filed herein, to put them in possession of the same.

And now having fully answered they pray to be hence dismissed with their reasonable costs.

LUCY A. CUNNINGHAM, JAMES CUNNINGHAM, CATHERINE R. CONNER, JOHN W. CONNER, FRANCES S. NICHOLS,

Defendants.

By MILLAN & SMITH,

Their Solicitors.

MILLAN & SMITH, Solicitors for Defendants. 33 Cross-bill of Lucy A. Cunningham & Catherine R. Conner.

Filed Dec. 9, 1908.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

Original Bill.

James H. Taylor, Executor and Trustee; Lemuel Toner Ergood, and Anna May Ruppert, Infant, by James A. Toomey, Her Next Friend, Complainants,

Lucy A. Cunningham, James Cunningham, Catherine R. Conner, John W. Conner, George W. Nichols, Frances S. Nichols, and E. Marshall Nichols and Allen G. Nichols, Infants, Defendants.

and

Cross-bill.

Lucy A. Cunningham and Catherine R. Conner, Complainants,

James H. Taylor, Executor and Trustee; Lemuel Toner Ergood, Anna May Ruppert, Infant; George W. Nichols, Frances S. Nichols, E. Marshall Nichols, Infant, and Allen G. Nichols, Infant, Defendants.

The Cross complainants Lucy A. Cunningham and Catherine R. Conner under leave of Court first had and obtained respectfully show to the Court:

(1) They are citizens of the United States and residents of the

District of Columbia and file this cross bill in their own right.

(2) The Defendant James H. Taylor is a citizen of the United States and a resident of the District of Columbia and 34 is sued as Executor and Trustee of the will of Susan Poulton and in the other capacities in which he appears as a party in the original bill in this cause, Defendant- Anna May Ruppert, Frances G. Nichols, E. Marshall Nichols and Allen G. Nichols are citizens of the United States and residents of the District of Columbia and are sued in their own right. Defendant Lemuel Toner Ergood is a citizen of the United States and a resident of the City of Denver in the State of Colorado and is sued in his own right. Defendant George W. Nichols went to Panama about a year prior to the filing of the original bill herein and has not been heard from for several months; if living he is interested in this suit in his own right. Defendants Anna May Ruppert is an infant of the age of eighteen years; defendants E. Marshall Nichols and Allen G. Nichols are infants above the age of sixteen years and are children of defendant George W. Nichols and his heirs at law if he be dead; defendant

Frances S. Nichols is the wife of the defendant George W. Nichols if he be living, his widow if he be dead, and entitled to a dower

interest in the real estate involved in this cause.

(3) On the 24th day of July A. D., 1908, James H. Taylor, Executor and trustee Lemuel Toner Ergood and Anna May Ruppert, named as defendants in the cross-bill, filed their original bill herein against these cross-complainants, together with James Cunningham husband of cross complainant Lucy A. Cunningham, John W. Conner, husband, of cross complainant Catherine R. Conner, said

George W. Nichols, Frances S. Nichols, E. Marshall Nichols and Allen G. Nichols as defendants. Said original bill al-35 leged among other things that a certain Susan Poulton formerly Susan Fitzgerald died in the District of Columbia on the 7th day of September, 1903, leaving a last will and testament and a codicil thereto by which she devised all her property real, personal and mixed to the said James H. Taylor as executor and trustee in trust to hold said property with full power to sell and to apply the income and profits therefrom to the maintenance and support of one Catherine Ruppert, daughter of said Susan Poulton, during her life and after her death to divide the said property equally between said Lemuel Toner Ergood and Anna May Ruppert, grand-children of the testatrix; that said Catherine Ruppert died on the 5th day of April, 1907, and that thereafter said James H. Taylor as such executor and trustee undertook, through and under proceedings in Equity in this Court, to sell the real estate of said testatrix and effect a division of her estate and that the same included the real estate hereinafter described which he found himself unable to convey because as is alleged, through a technical mistake in the deeds by which the title of the said Susan Poulton to the said hereinafter described real estate was acquired, she apparently took only a life estate when the intention of all parties to said deeds was that she should take an estate in fee-simple. Said bill seeks to reform said deeds so as to give the complainants a title in fee to said real estate and alleges that these cross-complainants with others of the defendants to said origi-

nal bill, are the heirs at law of George M. Nichols and Catherine Nichols grantors in said Deeds. These cross-complainants 36 have already answered said original bill denying all the substantial allegations thereof and now reiterate the averments

of their said answer.

(4) George M. Nichols and Catherine Nichols, the father and mother of these cross-complainants, by their two deeds the first dated the 19th day of November, A. D., 1869 and duly recorded among the land records of the District of Columbia in liber 601 at folio 442 et seq. and the other dated the 19th day of May, 1881, and duly recorded among said land Records in Liber 991 at folio 13 et seq. conveyed to William F. Poulton, trustee for the sole use, benefit and behoof of Susan Fitzgerald, afterwards Susan Poulton, certain real estate in the City of Washington, District of Columbia, including that involved in the original bill herein described as follows:

Part of lot A in George C. Hercus' subdivision in Square 385 as per plat recorded in Book W. F. page 140 Surveyor's Office D. C., described as follows: Beginning for the same at the southeast corner of said lot, and running thence southwestwardly along the north line of Maryland Avenue 32.75 feet, thence northwest-ardly at right angles to said Avenue 69.50 feet, thence north 8.46 feet, thence northeastwardly 30.50 feet, to a point in the east line of said lot 72.59 feet northwestwardly from the point of beginning, and thence southeastwardly along said east line of said lot 72.59 feet to said Avenue and the point of beginning. Copies of said deeds are filed as exhibits to the original bill herein.

(5) Since the death of the said Susan Poulton on to wit the 7th day of September, A. D., 1903, the cross-defendant James
 37 H. Taylor has been in possession and control of the said real estate, collecting the rents, issues and profits thereof and claiming the right so to do by virtue of the will of said Susan Poul-

ton, although her interest as the beneficiary under the said trust

deeds was only a life estate and expired with her death.

(6) That said George M. Nichols and Catherine Nichols are both dead. They died intestate. Said George M. Nichols at the time of the making of the aforesaid deed by which he conveyed an equitable life estate in said described land to said Susan Fitzgerald afterward Poulton, was seized and possessed of the same in fee and never otherwise alienated the same. On the death of the said Susan Poulton and the extinction of her life estate the heirs at law of said George M. Nichols became and still are, entitled to the possession of said land, and to the rents issues and profits thereof. The sole heirs at law of said George M. Nichols, left surviving him, were the complainants in this cross-bill and said George W. Nichols named as a defendant. Each of your said complainants in this cross-bill is therefore entitled to one-third interest in fee in said real estate and to onethird of the rents issues and profits thereof collected appropriated and applied by the said James H. Taylor since the death of said Susan Poulton. The remaining one-third belongs to said George W. Nichols if living, and to his heirs at law defendants E. Marshall Nichols and Allen G. Nichols, subject to a right of dower in defendant, Frances S. Nichols, if he be dead.

(7) These cross-complainants are informed and believe and therefore aver that inasmuch as the complainants in the original bill have invoked the jurisdiction of this court with respect to the aforesaid real estate, they, as complainants in the cross-bill, are entitled to further invoke it to the end that they be put into possession of said real estate and that said James H. Taylor be compelled to account to them for the rents, issues and profits thereof

by him collected as aforesaid.

Premises considered they pray as follows:

I.

That process issue and if necessary publication be made against the said defendants herein, James H. Taylor, Executor and Trustee, Lemuel Toner Ergood, Anna May Ruppert, George W. Nichols, Frances S. Nichols, E. Marshall Nichols and Allen G. Nichols, com-

pelling them to appear and answer the exigencies of this bill but answer under oath is hereby expressly waived.

II.

That the defendant James H. Taylor be ousted from control and possession of the said real estate and your said complainants in the cross bill, with the defendant George W. Nichols or the defendants E. Marshall Nichols and Allen G. Nichols, as the case may be, be put in possession and control thereof and that they may, if necessary have the writ of assistance to effect the same.

III.

That the defendant James H. Taylor be compelled to account for the rents, issues and profits of the said real estate by him, since the death of said Susan Poulton, collected and received and that they have a decree against him for their respective shares thereof.

IV.

That a guardian ad litem be appointed for the infant defendant Anna May Ruppert, and, if deemed necessary by the court, for the defendants E. Marshall Nichols and Allen S. Nichols, (said Frances S. Nichols having already been appointed guardian ad litem for them under the said original bill.)

V

That they have such other and further relief as the equities of the case may seem to the Court to demand.

LUCY A. CUNNINGHAM, CATHERINE R. CONNER,

Complainants.

MILLAN & SMITH,

Solicitors for Complainants in Cross Bill.

DISTRICT OF COLUMBIA, To wit:

Lucy A. Cunningham one of the complainants in the foregoing Cross-Bill being duly sworn upon her oath says: I have read the foregoing Cross Bill by me subscribed and know the contents thereof and the facts therein stated as of personal knowledge are true; those stated as upon information and belief I believe to be true.

LUCY A. CUNNINGHAM.

Subscribed and sworn to before me this 8th day of December, A. D., 1908.

SEAL.

A. M. PARKINS, Notary Public, D. C.

Endorsed: Leave to file. WRIGHT, Justice.

40

Answer of Infant Defendants.

Filed Mar. 11, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

Original Bill.

James H. Taylor, Executor and Trustee, et al., Complainants, vs.

Lucy A. Cunningham et al., Defendants.

and

Cross Bill.

Lucy A. Cunningham et al., Complainants, vs.

James H. Taylor et al., Defendants.

Answer of the Infant Defendants, E. Marshall Nichols and Allen G. Nichols, by Their Guardian Ad Litem, Frances S. Nichols, to the Cross-bill.

These defendants for answer to the cross bill herein filed, answering the same by their guardian ad litem say; they are infants under the age of twenty-one years and cannot therefore, either admit or deny the allegations of the said Cross Bill but submit their interests in this cause to the protection of the Court.

FRANCES S. NICHOLS,

Guardian Ad Litem for E. Marshall Nichols
and Allen G. Nichols.

41

Answer of Defendants Taylor & Ergood.

Filed Mar. 22, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

Original Bill.

James H. Taylor, Executor and Trustee, et al., Complainants, vs.

Lucy A. Cunningham et al., Defendants.

Cross Bill.

LUCY A. CUNNINGHAM and CATHERINE R. CONNER, Complainants, vs.

JAMES H. TAYLOR, Executor and Trustee, et al.

James H. Taylor and Lemuel Toner Ergood, defendants named in the above cross bill, jointly answering the same respectfully show as follows:

First. These defendants, James H. Taylor and Lemuel Toner Ergood, answering the first paragraph of said cross bill admit the

allegations therein contained to be true and correct.

Second. Said defendants, James H. Taylor and Lemuel Toner Ergood, for answer to the second paragraph of said cross bill say that they admit that the said James H. Taylor is a citizen of the United States and a resident of the District of Columbia and is sued in said cross bill as set forth in said paragraph and that the defendant Lemuel Toner Ergood is a citizen of the United

States and a resident of the city of Denver in the state of Colorado, and is sued in his own right. These defendants have no knowledge of the citizenship, residence or ages of the other parties mentioned in said paragraph two of said cross bill or any of the other matters contained in said paragraph two of said cross bill and therefore they can neither admit nor deny the same, and they call for proof thereof as far as said matters may be material

to the interests of these answering defendants.

Third. The defendants, James H. Taylor and Lemuel Toner Ergood, for answer to the third paragraph of said cross bill say that they admit that the original bill of complaint in this cause was filed on the 24th day of July, A. D. 1908, against the defendants mentioned in said paragraph of said cross bill and that said original bill alleged among other things that Susan Poulton, formerly Susan Fitzgerald, died in the District of Columbia on the seventh day of September 1903, leaving a last will and testament and codicil thereto by which she devised her real and personal property to James H. Taylor as executor and trustee, in trust to hold said property and to apply the income and profit therefrom to the maintenance and support of one Catherine Ruppert, daughter of said Susan Poulton, and after her death to divide the said real and personal property equally between said Lemuel Toner Ergood and Anna May Ruppert, grandchildren of said testatrix, and that said Catherine Ruppert died on the fifth day of April, 1907, and thereafter the said James H. Taylor, as executor and trustee, under the said last will and testament and codicil and also in pursuance of decree of this Court, undertook to sell the real estate of said testatrix including that described

of said cross bill as to what is alleged in said original bill, are incomplete and in some respects inaccurate and these answering defendants do not admit them to be correct recitals of the matters and things alleged in said original bill of complaint, but adopt and refer to said original bill of complaint instead of setting forth in this answer again at length the allegations in said original bill to show what is contained therein. These answering defendants are advised that they are not required in answering this cross bill to join issue or deny the allegations in the various answers to the original bill of complaint in this case, Nevertheless out of abundant caution these defendants do deny anything in said various answers contradicting in any wise the allegations in the original bill of complaint herein.

Fourth. These defendants, James H. Taylor and Lemuel Toner

Ergood, for answer to the fourth paragraph of said cross bill say that they admit that said George M. Nichols and Catherine Nichols executed the deeds to the property referred to in said paragraph of said cross bill, but in so far as said cross bill attempts to recite said deeds these defendants deny that said recital is correctly made, and they refer for a correct recital of what is contained in said deeds to the original bill of complaint filed herein and exhibits thereto.

Fifth. These defendants, James H. Taylor and Lemuel Toner Ergood, for answer to the fifth paragraph of said cross bill admit that the said James H. Taylor has been in possession and control

of said real estate since the death of said Susan Poulton, dedeased, and has collected such rents, and profits as he has been able to obtain on account of the same by virtue of the will and codicil of said Susan Poulton, deceased. These defendants deny the allegations therein contained that the interest of said Susan Poulton under said deeds was a life estate and expired with her death, and say that said deeds were intended to and in equity passed the fee simple title to the land and real estate described therein to said Susan Poulton now deceased.

Sixth. These defendants, James H. Taylor and Lemuel Toner Ergood, answering the sixth paragraph of said cross bill say that they admit that the said George M. Nichols and Catherine Nichols are both dead and that so far as they know said parties died intestate. These defendants admit that the said George M. Nichols, at the time of making the said deeds, was seized and possessed of the property therein described in fee simple, and so far as these defendants know that he never otherwise alienated the same and that the sole heirs at law of said George M. Nichols are the complainants in this cross bill and George W. Nichols, if he be living or he be dead, then his heirs at law E. Marshall Nichols and Allen G. Nichols. The remaining allegations in said paragraph of said cross bill these defendants deny and say that they are utterly untrue and that the complainants in said cross bill and heirs at law of said George M. Nichols and Catherine Nichols, or either of them have no right, title or interest whatever in the said property referred to in said cross

bill. Seventh. These defendants, James H. Taylor and Lemuel 45 Toner Ergood for answer to the seventh paragraph of said cross bill say that they are advised that since said allegation is a matter of law they are not required to answer the same, but nevertheless they deny that the complainants in said cross bill are entitled to invoke the aid of this Court and they deny that said complainants in said cross bill or the heirs at law of George M. Nichols are entitled to possession of the real estate referred to in said cross bill and they deny that the said James H. Taylor is liable to account to the said cross complainants, or to the heirs at law of George M. Nichols, and these defendants again aver that the complainants in said cross bill and said heirs at law of said George M. Nichols have no interest, right or title in it to the property referred to in said cross bill and that their effort to acquire an interest therein is unrighteous and without justification in a Court of Equity.

And having fully answered these defendants pray to be hence dismissed with their reasonable costs sustained in answering this cross bill.

JAMES H. TAYLOR. LEMUEL TONER ERGOOD, By PERCIVAL M. BROWN,

His Solicitor.

PERCIVAL M. BROWN, CHARLES W. CLAGETT, Sol'rs for Def't.

DISTRICT OF COLUMBIA, 88:

I, James H. Taylor, executor and trustee of Susan Poulton, deceased, do solemnly swear swear that I have read the aforegoing answer by me subscribed and that I know the contents thereof; that the facts therein stated on my personal knowledge are true and those stated on information and belief I believe to be true.

JAMES H. TAYLOR.

Subscribed and sworn to before me this 19th day of March, 1909.

[SEAL.] ANNA M. ANDERSON,
Notary Public.

Answer under oath on the part of Lemuel Toner Ergood is hereby waived and the signature to the answer of Lemuel Toner Ergood by Percival M. Brown as his solicitor is consented to by the cross complainants.

MILLAN & SMITH, Sol'rs for Compl'ts in Cross-bill.

Answer of Infant Defendant Anna May Ruppert.

Filed Mar. 27, 1909.

In the Supreme Court of the District of Columbia. Equity. No. 27954.

James H. Taylor, Executor, etc., et al., Complainants, vs.

Lucy A. Cunningham et al., Defendants,

and

Lucy A. Cunningham et al., Cross Complainants, vs.

James H. Taylor, Trustee, etc., et al., Cross Defendants.

Cross Bill.

This defendant for answer to the cross-bill filed against her in this cause, answering the same by her guardian ad litem, says:

She is an infant, under the age of twenty-one years and cannot either admit or deny the allegations of said cross-bill; she therefore submits her interests in this cause to the protection of the Court.

JAMES A. TOOMEY,
Guardian ad Litem for Anna May Ruppert,
Infant Defendant to Cross-bill.

DISTRICT OF COLUMBIA, To wit:

James A. Toomey being duly sworn upon his oath says: I am the guardian ad litem for Anna May Ruppert, infant defendant to the cross bill in this cause; I have read the foregoing answer by me, as such guardian ad litem subscribed and know the contents thereof and the matters and things therein stated as of personal knowledge are true; those stated as upon information and belief I believe to be true.

JAMES A. TOOMEY.

Subscribed and sworn to before me this 27th day of March, A. D., 1909.

J. R. YOUNG, Cl'k,
By F. E. CUNNINGHAM,
Ass't Cl'k.

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Answer of Frances S. Nichols.

Filed Mar. 30, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954, Docket 61.

James H. Taylor, Executor and Trustee, et al., Complainants, vs.

Lucy A. Cunningham et al., Defendants,

and

Lucy A. Cunningham et al., Cross Complainants, vs.

James H. Taylor, Executor, etc., et al., Cross Defendants.

This defendant for answer to the cross-bill of Lucy A. Cunning-ham and others herein filed says:

She admits the allegations of said cross-bill and consents to the relief therein prayed.

FRANCES S. NICHOLS.

Oath waived:

Solicitors for Cross-complainants.

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Replication to Answers to Cross-bill.

Filed Mar. 30, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954, Docket 61.

James H. Taylor, Executor, etc., et al., Complainants, vs.

Lucy A. Cunningham et al., Defendants,

and

Lucy A. Cunningham et al., Cross Complainants, vs.

James H. Taylor, Executor, et al., Cross Defendants.

The Complainants in the cross-bill hereby join issue with the defendants thereto, James H. Taylor, Executor and Trustee, Lemuel Toner Ergood, Francis S. Nichols, and the infant defendants Anna May Ruppert, E. Marshall Nichols and Allen G. Nichols, and their guardians ad litem upon their answers thereto.

MILLAN & SMITH, Solicitors for Cross Complainants.

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Joinder of Issue.

Filed Jun- 1, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

James H. Taylor, Executor and Trustee, et al. vs.

Lucy A. Cunningham et al.

The complainants hereby join issue with the defendants Lucy A. Cunningham, James Cunningham, Catherine R. Conner, John W. Conner, Frances S. Nichols, E. Marshall Nichols, infant, and Allen G. Nichols, infant, on their answers filed herein.

PERCIVAL M. BROWN, CHARLES W. CLAGETT, JAMES A. TOOMEY, Solicitors for Complainants.

Depositions for Complainants.

Filed Oct. 1, 1909.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 27954.

James H. Taylor, Executor and Trustee, et al., Plaintiffs, v.

Lucy A. Cunningham et al., Defendants.

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WASHINGTON, D. C., June 1, 1909.

Met, pursuant to notice to counsel for the respective parties, at the offices of Percival M. Brown, Esquire, Colorado Building, Washington, D. C. for the purpose of taking testimony on behalf of the complainants in the original bill in the above entitled cause.

Present: Percival M. Brown and Charles W. Clagett, solicitors for the complainants, W. W. Millan, solicitor for the defendants and for the guardian ad litem of the infants, E. Marshall Nichols

and Allan Nichols, and the Examiner.

By agreement between counsel it is stipulated that the testimony taken on the original bill may be used hereafter by either party in support of or in defense to the cross bill so far as competent and relevant.

Whereupon W. A. H. Church, a witness of lawful age, being first duly sworn deposed as follows:

- Q. What is your business, Mr. Church? A. I am in the lumber business.
- Q. How long have you been in that business in Washington? A. Do you mean as clerk or in my own business

Q. In the retail lumber business. A. Since 1874. I began as

a clerk.

- Q. What experience have you had upon condemnation juries in the city? And when did you first begin to serve upon such juries? Objected to as immaterial.
- A. I could not tell you exactly when I was first appointed on a condemnation jury, but, oh, seven or eight years ago, I guess, and from that time right along up till about a year ago.

Q. Are you familiar with the value of real estate in southwest Washington in the neighborhood of 937 and 939 Maryland Avenue?

Objected to as immaterial and because the witness has not shown himself an expert in real estate values.

A. Yes.

Q. Upon what do you base your statement that you are familiar

with such values? A. From the fact of sales being made in that location of which I have certain knowledge.

Q. Have you purchased much property in that general location?

A. I have, some.

Q. How far is your place of business from 937 Maryland Avenue, Southwest? A. About one square. I am between 8th and 9th and that is between 9th and 10th.

Q. In what section of the city were you born, Mr. Church?

11th and F Streets, Southwest.

Q. How long have you been familiar with the houses at 937 Maryland Avenue and 939, Southwest? A. Ever since 1862.

Q. What was the condition of that property about 1869?

Objected to as immaterial, irrelevant and incompetent.

A. I could not answer that question now. I don't remem-53 ber much about it.

Q. Mr. Church, I hand you Exhibits E and F in an Equity cause numbered 27,954, which are deeds to the property in reference to which you have just been testifying. I ask you what was the value

of that property in 1869, taking a fee simple title?

Objected to as immaterial, even if the witness were qualified to testify in reference to the matter in question, and for the further reason that the witness himself has expressly stated that he is ignorant of the conditions of the property in 1869, and for the further reason that he has not shown himself an expert in values now or at any time.

A. I could not answer that question.

Q. When did you first become familiar with the value of that

property? A. I should judge about 1879.

Q. What was the value of that property in 1879, taking a fee simple title?

Objected to for the reasons already stated.

A. My opinion is that that property at that time was worth somewhere about thirty-five hundred dollars (\$3500), and base my remarks upon this: I bought a house in 1879, I think in much better location, nearer to Smithsonian, corner Virginia Avenue and Eleventh. Nicer neighborhood. No annoyances like Maryland Avenue and railroad station. It cost about four thousand dollars (\$4000). I bought this from my father and did not pay that much for it, and I want to state that in fairness. Upon what I paid for my house, and considering its more valuable location and it was a more valuable house than this house, I base my 54 conclusions.

Q. In coming to your conclusion as to the value of that house in 1879, do you take into consideration your general knowledge of the value of real estate in your conclusion at that time? A. Yes, sir.

Q. Were the houses we have been talking about on Maryland Avenue in any different condition in 1869 than in 1879?

Objected to as leading. Witness has said he does not know the condition in 1869.

A. I know the condition of the house. Not inside, but as far as the condition of the house on the outside it is the same today as then. Of course not the same, but looks the same.

Q. Now you have mentioned certain draw backs in 1869 and from

that time down to recent times please state those drawbacks.

Objected to as irrelevant and immaterial.

A. There has been a grade crossing along the railroad as far as I can remember, and the worse conditions along there than anyone could picture, but there is a witness here who can give this information better than I can. He lives nearer than I do to this property.

Q. How long did these conditions exist? Up to the present time?

A. Partially done away with now, since the Union Station was established.

lished. Maryland Avenue was cut down about a year ago.

55 Cross-examination by Mr. MILLAN:

Q. How old were you in 1869? A. Fifteen years old about.

Q. Then of course as a matter of calculation you were twenty-five in 1879? A. Yes, sir.

Q. How much real estate had you bought and sold in 1879? A.

Only this one house, sir.

Q. How much did you give for that? A. I gave two thousand dollars (\$2000).

Q. But you say it was worth four thousand dollars? A. I do.

Q. How was that value arrived at? A. My father wanted to give me the house, but I would not take it, and I said I would give him two thousand dollars (\$2000) for it and asked how much it was

worth, and he said four thousand dollars (\$4000).

Q. So that estimate of its value was your father's estimate after all? A. Yes, sir. A much better estimate than I could put upon it. I want to explain that. He asks if my information was obtained from my father. He was the largest real estate owner in southwest Washington and owned in that immediate neighborhood thirty-five or forty houses.

Objected to as in no sense responsive to my question, and further, as being incompetent and as hearsay testimony.

Q. How much ground was attached to this house you bought from your father? A. In feet?

Q. Yes. A. I could not tell off hand.

Q. In being examined with reference to two houses in question you have had your attention called simply to the number of the houses without reference to the amount of land involved. What amount of land did you consider in making your estimate of the value of these houses? A. In looking at the houses I should say about twenty feet front.

Q. Which house? A. I only know one house. Q. How deep, Mr. Church? A. I could not tell.

Q. You looked at the house and judge about twenty feet front? A. Yes.

Q. I think you were asked about houses 937 and 939, were you

not, in the direct examination? A. Well, as I understood it, there is a flat alongside this house that is with the property.

Q. I want to know what you considered in making your estimate?

A. I considered a large brick house.

Q. What number? A. 937.

Q. And you made no estimate or calculation of the amount of ground that went with it? A. No.

Q. You were shown the deeds a moment ago? A. I glanced at

them.

Q. But you made no calculation of the amount of land involved? A. No.

Q. You did not observe the width or depth of the lot? A. No, sir. I just answered that question.

Redirect examination by Mr. Clagett:

Q. Mr. Church, does your business as retail lumber dealer require you to go over plans and specifications?

Objected to as not proper redirect examination.

A. Why generally speaking, it does, but I never do it.

Q. Did you ever do it? A. Yes, sir. To only a very limited ex-

tent, Mr. Clagett.

Q. I understand at the present time there are two houses on that lot 937. What was the condition of that property away back about 1870.

Objected to because it has already been gone into.

A. There was nothing there but a one-story room not more than twenty feet deep, I think, if that. It was not a house. It was really only a room.

Q. And you did not say anything about whether or not there was

a house there also. A. At 937?

Q. I understand then from what you say that at the present time there are two buildings on the property, but about 1870 there was a main dwelling, 937, and a little addition about ten feet high adjoining it?

Objected to as leading and as not being proper, being direct examination.

A. Yes, sir.

Q. That is all, Mr. Church. I am sorry to have to worry you.

W. A. H. CHURCH,
By W. L. BROWNING, Examiner.

Whereupon William Poulton, a witness of lawful age, was produced on behalf of the complainant- and after being first duly sworn testified as follows:

Q. Mr. Poulton, I hand you two deeds marked "Complainants' Exhibits E and F" respectively, in this suit, from George M. Nichols

and wife to William Poulton as trustee for Susan Fitzgerald. I will ask you if you know the property referred to in these deeds? A. I know the property, but I don't know that I ever saw the deeds. I know the property very well, but don't remember ever seeing the deeds.

Q. Is this the same property now improved in part by two brick dwellings known as 937 and 939 Maryland Avenue, southwest, Washington, D. C.? A. The same property.

Q. When you first became acquainted with Susan Fitzgerald, in

what year was it? A. In 1862.

Q. Were you acquainted with her husband, Edward Fitzgerald? A. Yes, sir, at the same time.

Q. When did he die? A. Really I could not say the year

he died? I guess it was about 1866.

Q. You are just testifying as to your recollection? A. Yes. I think it was somewhere about that time.

Q. You afterwards married Mrs. Fitzgerald, widow of Edward

Fitzgerald? A. Yes sir.

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Q. Do you know when this property described in these deeds was

bought by Mrs. Fitzgerald? A. Yes, sir.

Q. Please state what you knew about the transaction? A. I don't know anything, but that she bought the property, and I did not know she had bought it in my name until she told me. She had the money and she wanted to invest it, and she came across this investment and bought this property.

Q. How did she buy it? A. For a home. She moved right in

as soon as she could get possession.

Q. How did she pay for it? A. I really don't know whether all cash or not.

Q. Were you acquainted with George M. Nichols at that time? A. No, sir. I had seen him but had no acquaintance with him.

Q. Was this property purchased by Susan Poulton outright in fee simple or did she purchase a lesser interest?

Objected to as leading and especially so, because the witness has stated that he knew nothing about the purchase until after it had been made, and then only from hearsay.

A. She purchased it outright for a home.

Q. Mr. Poulton, did she buy a life interest in this property?

Objected to as leading and incompetent, because the best evidence is the deed itself.

A. She bought it outright. She did not buy any life estate.

Objected to and move to strike answer out as incompetent.

Q. How do you know that? A. Because I heard her talk about what she intended to do.

Objected to the answer and move to strike out because it is simply a repetition of self-serving declarations on the part of Susan Poulton, and therefore incompetent.

Q. Mr. Poulton, why was the title to this property taken in your name as trustee?

Objected to as witness has said he did not know until after it was done.

Statement by Mr. Brown that Mr. Millan's remark is not relevant to my question.

A. She did it because she did not want her husband to know she had the money saved up to buy property.

Objected to for the same reasons, and for the further reason 61 that it is incompetent and irrelevant to any issue in this case.

Q. What was the relation between Mrs. Fitzgerald and her husband at that time? I mean was it peaceable or strained?

Objected to as immaterial and irrelevant, the only issue in this case being whether a mistake was made in the preparation of the deeds involved.

A. No, they did not live very agreeably together. She wanted to get him out of the liquor business and that was why she bought this property, to get him to move away from their grocery and liquor store.

Q. Well, do you know what Mrs. Poulton did with this property immediately after buying it? A. She had some repairs made and

moved into the house.

Q. How soon after buying it did she move in? A. About four months before she could get the parties out who lived in it.

Q. When she moved in that house was her husband living with

her? A. Yes, he came back and forward.

- Q. Did he continue to live there with her? A. Yes, he kept the house, and had some furniture at the store. Afterwards he came to the house on Maryland Avenue after he gave up the business.
- Q. Was there a separation? A. No, there was no separation. Q. What was the reason she wanted to get him out of the liquor business?

Objected to as immaterial.

A. He was a great drinker and she wanted to try to get 62 him out of the business.

Q. Well, Mr. Poulton, did this habit of Mr. Fitzgerald's in regard to drinking result in making Mrs. Fitzgerald and Mr. Fitzgerald live apart for any length of time?

Objected to as immaterial.

A. No, they did not live apart any length of time. He often came to the house. I was in business at the time and could not tell very well. I boarded at the house.

Q. Did Mr. Fitzgerald come home every night, as far as you know? A. No, I don't think so, but don't know whether it was

every night or not.

Q. Now you say it took Mrs. Fitzgerald about four months to get

the tenant out of the property? A. A doctor lived there and it was hard to get him out. He had been living there some time.

Q. Then she moved in? A. Yes, sir. She moved in.

Q. Did you ever live there? A. Yes, sir.

- Q. When did you go to live there? A. When she moved in. Q. Were you boarding there? A. Yes, before they moved in.
- Q. And you went to board there? A. Yes, sir. I moved there.

 Q. What was the condition of the house when you moved in?
- Q. What was the condition of the house when you moved in? A. Well, the house was in bad repair. She had it painted and grained and fixed up the best she knew how.

Q. Now, Mr. Poulton, when she bought this property covered by these deeds, how far back did these lots run? A. On C

Street.

Q. All the way? A. Yes.

Q. Now what did Mrs. Poulton do in the way of improving this property?

Objected to as irrelevant and immaterial.

A. She built two houses on the back fronting on C Street.

- Q. Were they originally two houses? A. No, they were built in one at first.
 - Q. On C Street? A. Yes. Then she made two out of it. Q. What did she ever do with that property? A. Sold it.

Q. Sold it? A. Yes.

Q. To whom did she sell it? A. I don't know the partie-'s name.

Q. What was the size of the house or houses on C Street?

Objected to as immaterial.

A. The back lot was about thirty feet.

Q. How many rooms? A. Six rooms in all, I think.

Q. Did Mrs. Fitzgerald do anything on the Maryland Avenue front?

Objected to as immaterial.

- A. She built the small one-story place and made it two stories.
- Q. How long did Mrs. Fitzgerald continue to reside on this property? A. I think she lived there about six or seven years, I think so.

Q. Where did she move to? A. On 8th street. When she sold the house on the back she bought the 8th Street property.

Q. Where is that 8th street property you refer to? A. Between C and D Streets.

Q. What section of the city? A. Southwest.

- Q. When she bought the 8th street property she moved there? A. Yes sir.
- Q. What became of the property on Maryland Avenue, 937 and 939? A. She rented that.

Q. Did she get the rents for it? A. Yes, sir.

- Q. How do you know? A. Well, I am satisfied she got the rents. The people lived there for about eighteen years or more and paid the rent.
 - Q. Up to the time of her death? A. Yes, sir.

Q. She did all her own collecting? A. Yes, sir.

65 Q. Do you recollect why this second deed to this property made in 1881 to cure an error in description came to be

made? A. No, I could not tell you anything about that.

Q. Did Mrs. Fitzgerald tell you that you were to be trustee under the second deed? A. I don't remember her telling me anything of the kind.

Q. Might she have said something to you about it?

Objected to as leading, and an attempt by the plaintiif- to cross examine his own witness.

A. She might have, but I have forgotten it now. I never thought there would be any trouble.

Q. You never collected the rents for this property or did anything about it as trustee, did you? A. I never collected any rents.

Q. Did or did you not ever exercise any authority over this property? A. None at all. She looked after it.

Q. Did she always look after it from the time she bought it? A. Yes.

Q. Do you remember what rent the doctor who was the tenant of this house on Maryland Avenue was paying at the time when Mrs. Fitzgerald bought it?

Objected to as irrelevant.

A. He never paid any.

Q. Do you not know what he was to pay? A. No, he rented from Nichols.

Cross-examination by Mr. MILLAN:

Q. Do you mind giving us your age? A. Yes, I can tell 66 you my age.

Q. How old are you? A. About sixty-five, or something

like that.

Q. You stated in your direct examination that Mr. Fitzgerald died in 1866? A. Really, I don't know when he died, the exact year.

Q. Was it before or after the purchase of this property by Mrs. Fitzgerald? A. He died at this house afterwards.

Q. How long? A. I could not say, maybe a year or so.

Q. How long after his death before you married his widow? A.

I don't know. It might have been ten years.

Q. You did not know she had bought this property until after it was all over with and she told you she bought it? A. I knew when she bought it, yes.

Q. From her telling you so? A. I knew it. She told me when

she bought.

Q. And you did not know you were trustee in the deed until she told you? A. No.

Q. When she first bought the property it ran back through to

Maryland Avenue? A. Yes.

Q. How wide was it on Maryland Avenue? A. I guess thirty-one or thirty-two feet; something like that.

Q. And about the same width on C Street? A. No, I think the back lot is a little the narrower.

Q. Deep enough to cut in two and have a house on C St. and a house on Maryland Avenue? A. Yes, but it made

the yard short.

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Q. She told you she had bought it for a home. A. Yes, she bought it for a home. I knew that without her telling me.

WILLIAM POULTON, By W. L. BROWNING, Examiner.

Whereupon Charles R. L. Crown was produced on behalf of the plaintiff- and deposed as follows:

Q. What is your name? A. Charles R. L. Crown?

Q. What age? A. I was born in 1830. I am about 78 or 79 years old.

Q. What business were you engaged in during the war? A. The

auction business.

Q. How long did you remain in that business? A. About seven or eight years.

Q. When did you retire from the auction business? A. About

1870. I can't say positively.

Q. As an auctioneer, Mr. Crown, did you engage in the sale of real estate? A. I did, sir; yes, sir.

Q. Did you sell any real estate along about 1868 or 1869 in the neighborhood of 937 and 939 Maryland Avenue, Southwest? A. I don't think I did. I sold Mr. Church a good deal of property. I am the oldest auctioneer in Washington.

Q. Was this property in southwest Washington? A. Yes, sir.

Q. From this experience as an auctioneer, were you familiar with the value of real estate in southwest Washington in the neighborhood of 937 Maryland Avenue in 1869?

Objected to as irrelevant and immaterial, the question of the value of the property having no reference to the issues involved in this cause.

A. Yes, sir. I was.

Q. Did you purchase any property in that neighborhood your-self? A. I did.

Q. State what property you purchased and where it was located. Same objection.

A. In the same square 385 I purchased parts of lots 3 and 4.

Q. How close to Mrs. Fitzgerald? A. Joining Mrs. Fitzgerald. Same walls.

Q. How were those lots improved?

Same objection.

A. They were improved by frame houses and brick house, all along.

- Q. I mean the lot you purchased? A. It had a cottage between twenty-five and thirty feet front. Ran back between sixty and seventy feet, containing about two thousand feet of ground.
 - Q. How many rooms?

Same objection.

A. Taken in all about five or six rooms.

Q. Will you please state what you paid for this property? Same objection.

A. About nine hundred and eighty dollars or nine hundred and ninety-five dollars. Less than one thousand dollars.

Q. What rent did you get for this property?

Same objection.

A. At that time?

Q. At that time, yes. A. I got ten dollars apiece.

- Q. What do you mean when you say ten dollars apiece? A. I mean for each cottage. I subdivided the cottage and made two of it.
 - Q. What did you get for the cottage as subdivided? Same objection.

A. I got eight or ten dollars for each cottage. Now I get ten dollars and ten dollars and thirty cents at this time. One has one—two—three—and the other four rooms. Pretty good rent now.

Q. Do you recall when Mrs. Fitzgerald purchased 937 and 939

Maryland Avenue? A. I think in 1867 or 1869.

Q. I show you complainants' Exhibits E and F, which are deeds to that property from George M. Nichols and wife to William F. Poulton as trustee. Please look at them, and say whether this is the property upon which 937 and 939 Maryland Avenue, southwest, are built. A. This is the property, yes.

Q. Do you know what Mrs. Poulton paid for this property? A.

Four thousand dollars.

Q. Please describe this lot and state whether or not it ran back on C Street when purchased by Mrs. Fitzgerald?

Objected to as not best evidence.

A. Yes, this ran back.

Q. What was the condition of the house on Maryland Avenue when purchased by Mrs. Fitzgerald?

Objected to as immaterial.

A. In fair condition.

- Q. What houses were then on Maryland Avenue?
- A. Same objection.

A. The large brick house and a house one story high—for an office or something—which remained a good many years, when she went to work and put an addition on the top of it. She improved the one story building.

Q. Were there any buildings at the time she purchased it on the rear of the lot facing on C Street? A. None.

Q. Did she do anything about improving the rear of that lot? A.

Yes, sir.

Q. What did she do? A. She built two houses.

- Q. How large a house did she build? A. Twenty-five feet front.
 - Q. How many stories? A. Three, I think.

Q. Brick or frame? A. Brick.

Q. Do you know what she did with that property? A. I did hear she sold two houses on C Street.

Q. What for? A. I understood five thousand dollars.

Q. What was the value of the house built by Mrs. Fitzgerald on C Street?

Objected to as immaterial and for the further reason that he has not shown himself an expert in building.

A. Five or six hundred dollars.

Q. Which improvements are you talking about now? A. The little house next to the big one.

Q. What was the value of the three-story house she built on C

Street?

Objected to as immaterial and because he has not shown himself an expert in building.

A. I think the house cost her at that time when material was cheaper about twenty-two hundred dollars to build both. Maybe twenty-five hundred dollars. From twenty-two hundred to twenty-five hundred to build the two houses.

Q. Mr. Crown, I show you Complainants' Exhibit E being deed from George M. Nichols and wife to William F. Poulton, trustee, and also complainants' Exhibit F, being deed from George M.

Nichols and wife to William F. Poulton, trustee. Please look at the description of these deeds and state what was the value of the property mentioned therein at the time it was purchased by Mrs. Fitzgerald?

Objected to as immaterial.

A. Well, now, at that time she gave four thousand dollars for it. For the house and lot running through to C Street she paid every dollar it is worth. I cannot understand how any woman could have paid four thousand dollars for this property at that time, considering the condition it was in, the war just over and prices down.

Q. When you are speaking of four thousand dollars being a large price for this property are you speaking about a fee simple or life

estate?

Same objection.

A. A title in fee. As for title not in fee I would not give five hundred dollars for it.

Q. Please state what condition existed on Maryland Avenue in 1869 in this square which may affect the value of property?

Objected to as immaterial.

A. The railroad in front.

Q. Where was the passenger station? A. It was at the center of Maryland Avenue corner of the square I am in. The Washington and Alexandria railroad had it first and then for military purposes they occupied it and bought out the right in this ground.

Q. Did the railroads create much of an annoyance at that time?

A. They did indeed.

Q. Did Mrs. Fitzgerald have a conversation with you about the price of this property before she bought it?

Objected to as hearsay.

A. She did not.

Q. Did she have a conversation with you about the price of this property after she bought?

Objected to as incompetent unless the conversation were in the presence of Mr. Nichols.

A. Yes.

Q. Did you have a conversation with Mrs. Fitzgerald in which you told her anything about the price of the property at that time?

Objected to for the same reason.

A. Yes.

Q. How long before she bought the property? A. About a year after she bought the property I asked her, "Mrs. Fitzgerald, if it is a fair question, how much did you pay for this property?" She says, "I paid four thousand dollars." I said, Mrs. Fitzgerald, that is a big price for a piece of property located at the surroundings here. What was the matter with you?" She said, "I wanted it."

Objection to conversation between Mrs. Fitzgerald and witness which took place out of the presence of Mr. Nichols, as being incompetent for any purposes.

Cross-examination by Mr. MILLAN:

Q. How did you know that Mrs. Fitzgerald paid four thousand dollars for the property? A. She told me so herself.

Q. Is that the only way you knew it? A. I heard it before she paid it.

Q. Only hearsay? A. Yes.

Q. Did you know Mr. George M. Nichols at all? A. I did, sir.

Well acquainted with him sir.

Q. In making your estimate of the value of this property awhile ago how many feet of ground did you take into consideration? A. I think there is about four thousand feet of ground.

Q. You estimated it at how much a foot? A. About forty cents a foot. I bought a house and all for forty five cents; not exceeding fifty cents a foot under any consideration.

Q. That is all.

C. R. L. CROWN. CHARLES R. L. CROWN.

Subscribed and sworn to before me this 25 day of June, 1909. W. L. BROWNING, Examiner. Whereupon R. Harrison Johnson, a witness of lawful age, produced on behalf of the complainant-, after being first duly sworn, testified as follows:

Q. Mr. Johnson what is your business? A. Real estate broker.
Q. How long have you been engaged in that business?
A. Eighteen years.

Q. Where is your office? A. 306 Seventh Street, South-

west.

Q. Are you familiar with the values of real estate in southwest

Washington? A. I am.

Q. Do you know the property described in the two deeds filed as exhibits with the bill of complaint in this cause and marked "Exhibits E and F," being deeds from George M. Nichols and wife to William F. Poulton, trustee for Susan Fitzgerald? A. I do, which property I understand to be 937 and 939 Maryland Avenue, southwest, and the land in rear of same.

Q. Have you bought or sold any property in the neighborhood or land and real estate described in said deeds? A. I have sold property in the vicinity in square 384, the square just north of square

385, the property involved.

Q. How long have you known that property? A. About twenty five years.

Q. What was its condition when you first knew of it?

Objected to as immaterial and irrelevant.

A. The property was similar to a great many houses in that vicinity, not a modern structure, and from appearance would indicate that its physical condition had not been kept up and that condition is based upon an agency of the management of the property for four years or more. The property at the time it came into my hands about the year 1904 was in a much dilapidated condition, so much

so that after the then tenant vacated same we were unable to

secure an additional tenant for the house.

Further objection to all that part of the answer which relates to the present condition of the property and its condition since it came into the hands of this witness for the reason heretofore stated, and I make this objection to the answer because that part of the answer is not responsive to the question and therefore the objection could not be interposed earlier.

Q. Who was the tenant of this property when you first took charge of it? A. A Mr. Woltz.

Q. Do you know how long he had been tenant of that house?

A. I do not, other than those in charge informed me that he had been——

Objection to what those in charge informed him.

A. A tenant for many years past.

Q. Mr. Johnson, when you first became acquainted with this property, you say twenty-five years ago, were there two houses on C Street built at all? A. I am not just certain about that point. My

course of travel was generally down Maryland Avenue instead of C

Q. What in your opinion would be the fair market value of that portion of the property improved by premises 937 and 939 Maryland Avenue, southwest, which was sold by James H. Taylor, executor and trustee, under the will and codicil of Susan Poulton, de-

ceased, and as trustee in a certain -uity cause in the Supreme Court of the District of Columbia known as number 27,212, 77 to Annie C. Chisholm and William B. Chisholm.

Objected to as immaterial and irrelevant, the value of the property at any time not being in issue, particularly is the value of the property at the present time not in issue not reflecting any light upon its value at the time it passed under these deeds, even if that were material; and further objection because the question relates to only a portion of the property covered by the deeds in question.

A. A fair value of the property is twenty-eight hundred dollars, and in my judgment that amount represents outside figures, as I have in mind an auction sale at which the property was offered and at which I was present, and my recollection is that the best price offered at the auction sale was twenty-two hundred dollars.

Q. What auction sale do you refer to? of this property? A. Yes.

Q. When was this auction sale held?

Same objection, as being immaterial.

A. I think that was held in the latter part of 1907.

Q. That was an auction sale of this same property 937 and 939

Maryland Avenue? A. It was.

- Q. Now, Mr. Johnson, not considering the value of the improvements which were placed on the portion of this property fronting on C Street by Mrs. Poulton, what would you say that ground in that portion of the property fronting on C Street is valued at?
- Objected to as immaterial, and irrelevant on the grounds 78 heretofore stated.

A. At this period?

Q. Yes. A. Thirty-five or forty cents per square foot.

Q. Do you know how many feet there are in the portion of the property fronting on C Street? A. I should say about one thousand or twelve hundred feet.

Q. Now, in your opinion, Mr. Johnson, is that property-I am referring to the whole of it-worth more or less when you first knew it twenty-five years ago than it is now?

Objected to as irrelevant and immaterial.

A. The property is worth less, considering the amount of improvements at this time.

Q. How much less at this time?

Same objection.

A. I should say there has been a depreciation of from ten to fifteen per centum.

Cross-examination by Mr. MILLAN:

Q. Mr. Johnson, how old are you? A. Forty years of age.

Q. You were born the year these deeds were made? A. In May, 1869.

Q. Did you know George M. Nichols? A. I did not.

Q. Did you know Mrs. Fitzgerald? A. I did, very well.

Q. That is all.

R. HARRISON JOHNSON, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of June, 1909.

—— —, Examiner.

Whereupon William B. Turpin, a witness of lawful age, having been produced on behalf of the complainant-, after being first duly sworn, testified as follows:

Q. Mr. Turpin, was is your business? A. Real estate broker.

Q. How long have you been in that business? A. A little over twenty years.

Q. Where? A. 1429 New York Avenue, Washington, D. C.

Q. Are you familiar with the values of real estate in the city of Washington? A. I consider that I am.

Q. Are you familiar with values in southwest Washington? A.

I consider that I am.

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Q. Have you sold any property there? A. Yes.

Q. Appraised any property. A. Yes, appraised property.

Q. I hand you deeds marked "Complainants' Exhibits E and F" in this case, same being deeds from George M. Nichols and wife to William F. Poulton, as trustee for Susan Fitzgerald, and ask you to look at the descriptions in these deeds and state if you are familiar with that property? A. Yes, sir; I am.

Q. How long have you been familiar with that property?

A. Well, particularly the last little over two years.

Q. How long before in a general way? A. Oh, for twenty years

or more generally, I suppose.

Q. Do you know that portion of the property improved by buildings numbered 937 and 939 Maryland Avenue, southwest, which was sold by James H. Taylor, as executor and trustee under the will and codicil of Susan Poulton, deceased, as trustee in a certain equity cause pending in the Supreme Court of the District of Columbia numbered 27212 to Annie C. Chisholm and William B. Chisholm? A. I am familiar with that, yes.

Q. Did you ever have occasion to appraise that property? A. I

appraised that property in June, 1907.

Q. At what did you appraise it?

Objected to as irrelevant and immaterial and reflecting no light upon any issue involved in this case, the sole issue being whether a mistake was made in the preparation of the deeds referred to, which were made years before the period referred to in the question.

A. I appraised the ground at sixty cents a foot, amounting to fourteen hundred and twenty-five dollars (\$1425) and the improvements at fifteen hundred dollars (\$1500), making an aggregate of twenty-nine hundred and twenty-five dollars (\$2925). I have examined the property again with a view of testifying here today and see no reason to change my appraisement.

All that part of the answer which refers to the present value of the property is objected to on the ground already stated.

81 Q. Mr. Turpin, are you familiar with that portion of the property which is improved by houses fronting on C Street? A. I remember going over that rather carefully two years ago, and I went by and looked at it in a casual way this morning.

Q. Notwithstanding the improvements on it by Mrs. Fitzgerald, but taking it as vacant ground, what, in your opinion is that ground

worth?

Same objection.

A. That ground is worth approximately, in my opinion, forty cents per foot.

Q. Do you know how many square feet there are in that part of the property fronting on C Street? A. I say roughly one thousand

feet. I have not made a particular examination of that.

Q. Now, as far back as your recollection of the property goes, I believe you say it is about twenty-five years, has that property at any time been worth more than the figures which you have given at the present time or when you appraised it?

Same objection.

A. I think not.

Q. That is all.

Cross-examination by Mr. MILLAN:

Q. How old are you, Mr. Turpin? A. Fifty-two years old. Q. Did you ever live in the vicinity of this property? 82 I did not.

Q. Did you know Mr. George M. Nichols? A. No.

Q. Mrs. Fitzgerald? A. No.

Q. That is all.

WILLIAM B. TURPIN, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of June, 1909. -, Examiner.

Whereupon James H. Taylor, complainant in this case, produced on behalf of the complainants, after being first duly sworn testified

Q. Mr. Taylor, you are one of the complainants in this cause? A. I am.

Q. You are, I believe, the executor of the will and codicil of Susan Poulton, deceased? A. I am.

Q. Susan Poulton is the same party referred to in Complainants' Exhibits E and F as Susan Fitzgerald, is she not? A. She is.

Q. When did you first become acquainted with Susan Poulton, deceased? A. Four or five years before her death, I think. 83

Q. When did she die? A. September 7, 1903.

Q. Did you qualify as executor under her will and codicil. A. I did.

Q. Were you acquainted with Catherine Ruppert? A. I was trustee for Catherine Ruppert under the will and codicil of Mrs. Poulton.

Q. How was Catherine Ruppert related to Susan Poulton, deceased? A. She was her daughter and only surviving child.

Q. Is she still living? A. No, she died, April 5, 1907.

Q. After the death of Susan Poulton and Catherine Ruppert, deceased, did you sell any of the property belonging to her estate? A. After the death of Mrs. Poulton we sold one piece of property for the payment of her debts and legacies under proceedings of probate Court. The balance of the property I held in trust for Mrs. Ruppert, paying her the income from it until the date of her death. Harrison Johnson was the agent in charge during that time. After the death of Catherine Ruppert in April 1907, we filed a partition suit in the Supreme Court of the District of Columbia, being No. 27,212. The suit was filed in July and early in the fall we offered the property in Southwest Washington at public auction, disposing of all except the property involved in this proceeding and mentioned in the deeds filed as exhibits E and F. At the public sale we were offered twenty-two hundred for the premises 937 and 939 Maryland

Avenue, Southwest, Washington, D. C., and afterwards I 84 think the bid was increased to twenty-three hundred dollars. The property was not sold at that time, but shortly afterward an offer was brought to us by Harrison Johnson of twenty-eight

hundred dollars from Annie C. Chisholm and William B. Chisholm.

Mr. MILLAN: I have waited for a question to be asked that I might interpose an objection to this testimony in an orderly way, but as it has gone on without questioning I object to all this line of testimony as irrelevant and immaterial.

A. The offer was reported to the court and with the authority of the Court accepted.

Q. Why was not the sale to Annie C. and William B. Chisholm perfected and completed?

Objected to as irrelevant and immaterial.

A. Upon the title being examined it was reported to be slightly defective on account of an error in the conveyance to Mrs. Poulton.

Q. Was that the first occasion on which you had ever heard the title to Susan Poulton, deceased, to which you succe-ded as her executor, questioned? A. It was.

Q. When did you first hear of a claim of title to that property on behalf of the heirs of George M. Nichols, deceased?

Objected to as immaterial.

A. The latter part of 1907 or early in 1908.

Q. Was that after you approached them to get a quit claim deed from them? A. I can't say, for the reason, that negotiations

were carried on by Messrs. Brown and Clagett.

Q. Had you ever heard of any claim on the part of the heirs of George M. Nichols, deceased, prior to the time when this title was examined for Annie C. Chisholm and William B. Chisholm? A. I never had.

Q. Was it out of that examination that your first information came? A. It was, and I did not regard the defect as a serious one

at that time.

Q. Who has been in possession of the property referred to in this cause since the death of Susan Poulton, deceased? A. I took possession of the property immediately after Mrs. Poulton's death?

Q. Have you had possession ever since, either yourself or through

tenants? A. Yes.

Q. I offer in evidence Exhibits A, D, E and F, attached to the bill of complaint in this cause, Exhibit A being a duly certified copy of the will and codicil of Susan Poulton exhibit D being a certified copy of the decree of the Supreme Court of the District of Columbia in Equity Cause numbered 27,212 appointing James H. Taylor, trustee, and authorizing him to sell the estate of Susan Poulton, deceased, described in said cause; Exhibit E being a deed from George M. Nichols and wife to William F. Poulton, trustee for Susan Fitzgerald, recorded November 22, 1869 in liber 601

at folio 442, et seq. in the office of the Recorder of Deeds for the District of Columbia, and Exhibit F being a deed from George M. Nichols and wife to William F. Poulton, trustee for Susan Fitzgerald recorded May 23, 1881, in Liber 974 at folio 13 of the records in the office of the Recorder of Deeds for the Dis-

trict of Columbia.

Mr. MILLAN: I object to the introduction of Exhibit D in so far as it is relied upon to give the complainant, James H. Taylor, any right to bring or maintain the present suit.

Cross-examination by Mr. MILLAN:

Q. Mr. Taylor, you have stated that upon the examination of this title it was reported that it was slightly defective because of a mistake in the preparation of the two deeds referred to. Is that right? A. That is the opinion Mr. Cull gave when he sent for me.

Q. You have no personal knowledge, have you, as to whether there was any mistake in these deeds you are trying to maintain in this suit that it was a mistake and was not done intentionally? A. Cer-

tainly, that is my opinion.

Q. But you have no knowledge as a matter of fact the deeds were made in 1869? A. I have not any personal knowledge.

Q. That is all.

JAMES H. TAYLOR, By W. L. BROWNING, Examiner.

87 Met, pursuant to notice to counsel for the respective parties, at the offices of Percival M. Brown, Esquire, Colorado Building, Washington, D. C., on the 18th day of June 1909, for the purpose of continuing taking testimony on behalf of the complainant in the original bill in the above entitled cause.

Present: Percival M. Brown, solicitor for complainant, and

W. W. Millan, solicitor for defendants.

Whereupon Charles R. L. Crown, a witness of lawful age, who has heretofore testified on behalf of said complainant, was recalled, and testified as follows:

Q. Mr. Crown, when you last testified in this cause you stated that you purchased some property adjoining the property of Mrs. Fitzgerald in square three hundred and eighty-five (385), which is in controversy in this suit, did you not? A. Yes.

Q. State again what property you purchased there?

Objected to as immaterial, and as having no possible bearing on the question of whether a mistake was made in the deed involved in this cause.

A. Joining Mrs. Fitzgerald. Part of lots three and four in square three hundred and eighty-five (385), improved by a cottage, about twenty-five feet front-made into two now,-for nine hundred and eighty-five dollars (\$985.00), one-half (1/2) cash and the balance, I think six (6) and twelve (12) months.

88 This answer is objected to for the same reason. I move to strike it out.

Q. When did you buy that property? A. April 12, 1869.

Q. How many feet were there in that piece of ground that you purchased?

Objected to for the same reason.

A. About two thousand, one hundred (2100). Maybe a little less or more than that.

A. How did you buy it? At public or private sale?

Objected to for the same reason.

A. At public auction.

Q. Was it a fair sale?

Same objection.

A. Yes, sir. A crowd of people were there and a great many people said I paid enough for it. I said "It is a fair sale—a fair price."

Objection to the latter part of the answer, which purports to give statements of other people, as being hearsay, this objection being interposed now instead of before the answer was made because this part of the answer is not responsive to the question and could not have been anticipated.

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Q. Mr. Crown, you have testified that you were a real estate auctioneer, and familiar with the values of property in southwest Washington? A. Yes, sir.

Q. In view of that experience and knowledge of jours, do you consider you paid a fair price for the property or more

or less?

Objected to for the reasons already stated.

A. I did. I considered this a fair price.

Q. Mr. Crown, when did you make this memoranda which you hold in your hand? A. On the day of the sale, on the 12th of April, 1869.

Q. Is that memoranda in your handwriting? A. Yes, my hand-

writing, sir.

Q. Will you please read it?

I object to the introduction of this paper or its contents in evidence on the ground that it has no possible bearing upon any issue involved in this case and is irrelevant, and immaterial, and I would further state that if the question of values is at all material, this paper can shed no light upon the value of the property in controversy in this cause, and is therefore immaterial for that reason, and irrelevant.

A. "April 12, 1869, frame house and lot, under deed of trust by Todd for nine hundred and eighty-five dollars (\$985) one-half (½) cash and the balance in six (6) and twelve (12) months, one hundred dollars (\$100.00) paid down at the sale. Wheeler and Co. Auctioneers."

Q. Have you any objection to my offering this paper in evidence?

A. No, if you take care of it.

Q. I offer this memorandum in evidence and ask the Examiner to mark it "Complainant's Exhibit Crown Testimony, No. 1."

Witness produces another paper.

Objection to the introduction of this further paper or its contents in evidence for the reasons already states with reference to the first paper.

Q. What is this memorandum that you have, Mr. Crown? A. Part of lot three and four in square three hundred and eighty-five (385), fronting Maryland Avenue, twenty-nine (29) feet, nine (9) inches, running back on one angle sixty-five (65) feet, six (6) inches, running back on the other angle seventy-three (73) feet, six (6) inches. Bought, April 1869.

Q. Is that memorandum in your handwriting? A. Yes, sir.

Q. When did you make that? A. About an hour before I got here.

Q. You say you made this memorandum today? A. I did; today.

Q. What did you make it from? A. From the deed. I took the deed and copied parts of it.

Q. Mr. Crown, I hand you the other memorandum marked "Com-

plainant's Exhibit, Crown Testimony, No. 2," written in purple ink and ask you when you made this memorandum?

Objected to as immaterial.

A. In 1869 when I purchased the property.

Q. I offer this second memorandum, which Mr. Crown has produced, written in lead pencil, which he said he prepared today simply for the purpose of getting a rough description of his property on the record. If counsel for the complainants consider it necessary they will procure the deed or a copy of it conveying the property

to Mr. Crown, for the purpose of offering it in evidence. I ask the Examiner to — this second lead pencil memo-

91 randum of Mr. Crown's "Complainant's Exhibit, Crown testimony, No. 2."

Objection to introduction of this paper in evidence for the reasons already stated.

No cross-examination.

CHARLES R. L. CROWN, By W. L. BROWNING, Examiner.

Whereupon Mrs. Mary L. Bamberger, a witness of lawful age, produced on behalf of the complainant, having been first duly sworn, testified as follows:

Q. Mrs. Bamberger, where do you reside? A. 927 Maryland Avenue Southwest.

Q. How long have you resided there? A. All my life.

Q. Have you resided there continuously all your life? A. All but six (6) weeks, when my mother died when I broke up and left. I returned in six weeks' time.

Q. Would you mind telling how long a period that covered? A.

Sixty-six years. I don't mind telling it.

Q. Were you acquainted with Mrs. Susan Fitzgerald? A. I was acquainted with her on the streets as she passed the house. I never was in her house in my life.

Q. Where did Mrs. Fitzgerald live when you first became ac-

quainted with her? A. In that house and lot on our square.

Q. What was the number of it? A. I think 937. I am not sure, but I think it was 937.

Q. What street? A. Maryland Avenue, Southwest.

Q. Do you remember when she moved into that property? A. I don't recollect exactly the time she moved. I know it was some years before 1873.

Q. Did her husband move into the property with her? A. I

don't know anything about that.

Q. Do you know whether there was any separation between Mrs. Fitzgerald and her husband?

Objection to this question as immaterial and irrelevant.

A. I don't know anything particularly about that. I never paid any attention to anything like that. I never bothered with family affairs.

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Q. Who were living with her in the house when she first came there?

Same objection.

A. I don't know.

Q. Were there any children? A. Yes, there were three children.

Q. Anyone else? A. I don't know anything about that. I know she had three children, Eddie, Mamie, and Katie; that is what they called them.

Q. When Mrs. Fitzgerald moved into that property, did she do anything with it in the way of improvements or not after she got it, to your knowledge?

Objected to as irrelevant and immaterial, because it sheds no light upon whether any mistake was made in the deeds 93 involved in this case.

A. Well, those two houses were built on the back of the lot. The ground runs through from Maryland Avenue to C Street southwest, and then there was a little one-story house on Maryland Avenue that adjoined the brick, which she raised to another story. There was a little one-story place there during the war. A young man named Hercus kept a store. A little brick place put there on the whole width of that lot.

Q. Do you know when these improvements were made? A. I

could not say exactly when they were made.

Q. Were they made by Mrs. Fitzgerald? A. Well, she owned the property. It must have been done by her, I should think.

This answer is objected to, and I move to strike it out on the ground that it is a mere inference or supposition on the part of the witness.

Q. Mrs. Bamberger, did Mrs. Fitzgerald ever talk to you about purchasing this property or how she came to purchase it.

Objected to. Unless the conversation is shown to have taken place in the presence of Nichols, grantor in the deed, or a party to this suit.

A. No, she did not.

Q. How do you know then that she owned the property? A. She always professed to own it and I supposed from the way she talked that she did own it. It was taxed in the name of Susan Fitzgerald and when it was advertised it was in her name. Several time- it was advertised for sale, and I thought she owned it. She always professed to own it.

Q. Mrs. Bamberger, you testified that you don't know about any separation? A. No, I only know what I heard. I 94 consider it a family affair and I don't know anything about it.

Q. Well, did you hear at that time that there was any trouble? A. No, not when she bought it.

Q. Did you ever hear it?

Objected to the witness testifying as to any matters of hearsay.

A. Yes, I have heard it, but I don't want to answer it.

Q. When did you hear it? A. Well, now, I could not tell you days and dates. It is impossible.

Q. Was it recently? A. Long ago. I never took notice of such

things. It was not my affair.

Cross-examination by Mr. MILLAN:

Q. Mrs. Bamberger, your acquaintance with Mrs. Fitzgerald consisted merely of seeing her pass on the street. Did you have a speak-

ing acquaintance with her? A. Yes.

Q. Was she ever in your house? A. I think she called once or twice on business with my father, but what it was I don't know. I know she was there because father and she used to come in the shop. Papa worked in the wheelwright's shop. I don't know their affairs because he never said what she talked about.

Q. I understood you to say you never talked to her. Did you ever talk to her about her ownership of this property?

95 A. No.

Q. She never said anything to you about it, or to anybody else in your presence? A. No, she did not.

Q. Did you know George M. Nichols? A. I did not.

That is all.

MARY L. BAMBERGER, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of June, A. D. 1909.

Whereupon Mrs. Lucy A. Cunningham, one of the defendants named in the original bill filed herein, a witness of lawful age, was produced on behalf of the complainants, and after having been first duly sworn, testified as follows:

Q. Mrs. Cunningham, will you please state who your father was? A. George M. Nichols.

Q. Is he living? A. He is dead.

Q. When did he die? A. He died in 1885, November.

Q. Where did he die? A. Maryland.

Q. What place in Maryland? A. Norbeck. Q. What county? A. Montgomery.

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Q. Was he residing there at the time of his death? A. Yes. Q. How long had he resided there before his death? A. I could not answer that. I don't know. Several years I think.

Q. Were you living with him there at that time? A. No. I was

not.

Q. Were you married at that time? A. I was.

Q. Where did your father reside before he moved to Norbeck? A. Well, in Washington some and most of the time in St. Mary's County.

Q. Where was he living just before he moved to Norbeck? A. I

think he lived on 9th street, near boundary.

Q. Do you know the number of the house? A. I do not.

Q. Were you living with him when he was on 9th street, near boundary? A. Oh, yes.

Q. You were living at home, then? A. Yes.

Q. Not married at that time? A. No.

Q. Do you know when he moved to that house on 9th Street, near boundary? A. I was nothing but a child, and I don't know anything about this. 97

Q. Where did he live in St. Mary's County?

farm near Piney Point, St. Mary's County, Md. Q. Was it after he left the house on 9th street, near boundary that he lived at Piney Point? A. Well, he had lived there before and he

lived first one place and then another. He owned property there and in Washington. He did not stay in one particular place long.

Q. Do you remember residing with your father in any other house in Washington than the one at 9th and the boundary? A. Yes, I lived in this house on Maryland Avenue. I was quite small when we moved away from there and I just can remember. We moved to Ninth Street near boundary.

Q. The house you refer to is 937 Maryland Avenue? A. It is

the house involved in this suit.

Q. Then your father lived there at one time? A. Yes.

Q. You say when he left that property, 937 Maryland Avenue, southwest, he moved to 9th street near boundary? A. Yes.

Q. Did he have any other residences in Washington at any

time other than those you mentioned? A. Yes.

Q. Where else did he reside? A. I think he lived on 14th Street once before I knew anything about it, between P and Q Streets, during the war sometime, but I don't remember that.

Q. That was before he lived on Maryland Avenue, Southwest?

A. Oh, yes.

98 Q. Now, you remember living in the house in Washington on 9th street near boundary? A. Yes.

Q. Were you living in that house when you were married? A.

No, we moved from there to the country at Norbeck.

Q. You were married while you lived at Norbeck? A. No, we came back to Washington.

Q. But you were really living there at that time? A. I did not get married there and I was not living there. My mother came back to Washington and we were living here.

Q. Where were you living then? A. After we came back? On

10th Street.

Q. Do you remember the number? A. I do not. Q. Between what streets? A. Between M, I think.

Q. Did your father come into that M Street house? A. No.

Q. Your father was living with you in the house on 9th street near boundary, was he not? A. Yes, we moved there from Maryland Avenue.

Q. Do you remember moving into that 9th Street house? A. Yes.

Q. Well, you can recollect in a general way about the number of years you lived there, can you not? A. No, I don't know that.

Q. Five or six years? A. No, I don't think so.

99 Q. Three years? A. Probably.

Q. Was your father an active man at the time he lived on 9th street?

Objected to this question. I have not interposed any objection to this line of testimony, supposing it was preliminary to something material, but I now object on the ground that it is immaterial and irrelevant, as it sheds no light whether a mistake was made in the deeds involved.

A. Yes, I should say he was.

Q. Did he go about the city and country where he wanted to. A. I should say he could. He enjoyed life.

Q. Was he engaged in any business?

Objected to for the same reasons.

A. Well, he had the postoffice at Norbeck. He went there and had a postoffice and store.

Q. Did he have any business in Washington? A. No, he had no

business in Washington.

Q. I mean when he was in the 9th Street house? A. No, he did not have any business.

Q. He owned other property in Washington? A. Yes.

Q. Did he collect his own rents? A. He did.

Q. Did he own any property in southwest Washington? I mean the property involved in this suit.

Objection for the same reasons.

A. I don't know whether he owned there or not. My mother owned there.

Q. Did he collect your mother's rent?

Same objection.

A. No, he did not collect my mother's rent.

Q. Did he look after your mother's property in regard to repairs? Same objection.

A. No.

Q. Who did? A. She did herself, I guess.

Q. Is it not a fact he owned some other property in southwest Washington? A. I don't know. I was a child and I heard them talk of rents, but I did not know where the property was situated.

Q. How old was your father when he died Mrs. Cunningham?

A. Fifty-five or fifty-six.

Q. You have stated the date of his death? A. 1885. Q. What was your mother's name? A. Catherine.

Q. Is she living? A. No, she is dead.

Q. When did she die? A. 1890 or 1891; I don't know just when.

Q. Where did she die? A. Right here in Washington.

Q. Please state the names of all the children of your father and mother; all of them? A. All of them?

Q. Yes. Q. Dead and alive?

- Q. Yes. A. Well, I had a brother Charles, who is dead, who was the oldest.
- Q. When did he die? A. He has been dead a long time. He went away from home and died out west.

Q. Was he ever married? A. No.

Q. Who is the next? A. The next is myself.

Q. The next? A. George W.

Q. Is he living? A. I don't know. He went away too. He has

been gone two years last December.

Q. Where was he when you last heard of him? A. He was on the Panama canal and had a position there but he is not with that position because we have written, but cannot find out a thing.

Q. Do you know what particular place on the canal. A. We did

know, but he is not there now.

Q. Do you know now? A. I don't know now, but I could find out But he is not there, because we have tried to find out.

Q. You really don't know where he is? A. No.

- Q. When you last heard he was somewhere on the Panama canal?
 A. Yes.
- Q. What was the date when you last heard? A. I don't know.
 - Q. State as near as you can. A. About a year ago, I guess.

Q. Was he married? A. Yes. Q. Is his wife living? A. Yes.

- Q. What is her name? A. Frances S. Nichols.
- Q. She is one of the defendants in this suit? A. Yes.

Q. Did he have any children? A. Two.

- Q. What are their names? A. E. Marshall Nichols and Allan G. Nichols.
- Q. They are also defendants in this suit, are they not? A. I guess so.

Q. Are they of age, those boys? A. No, they are not of age.

Q. Do you know what their ages are? A. One is seventeen and one eighteen. One is really sixteen in his seventeenth year, and one is eighteen years in July.

Q. Are there any other children of George W. Nichols? A. No.

that is all.

Q. Now proceed and state if there are any other children of your father, George M. Nichols? A. Mrs. Catherine R. Conner is the youngest.

Q. She is one of your sisters? A. She is my own sister.

Q. Living in Washington and a defendant to this suit?
A. Yes sir.

Q. Now, Mrs. Cunningham, are there any other children of your father and mother, George M. and Catherine Nichols, that you have not mentioned? A. No.

Q. Did your father leave a will? A. I don't think so. I am sure he did not. My father dropped dead. He had no chance to say or do anything. He died right on the road with his clothes on.

Q. You never heard of any will? A. No, I know he did not,

because if he had I would have known it.

Q. Mrs. Cunningham, I want to ask you about how old you were when your father died? A. What has that got to do with it. I am of legal age now. I am endeavoring to forget my age.

Q. Were you married when your father died? A. Yes, sir.

Q. I think that is all.

No cross-examination.

LUCY A. CUNNINGHAM, By W. L. BROWNING, Examiner.

Met, at the offices of Percival M. Brown, in pursuance of agreement of counsel, on Thursday, June 24, 1909, to take testimony on behalf of complainants in the original bill in this cause.

Whereupon Judson T. Cull, a witness of lawful age, having first been duly sworn, was produced on behalf of complainants and testified as follows:

Q. What is your age and business, Mr. Cull? A. I am 64 years

of age, and a lawyer.

Q. I hand you herewith a paper, which please state what it is, identifying it. A. Deed from George M. Nichols and Catherine, his wife, to William F. Poulton, trustee for Susan Fitzgerald, dated May 19, 1881, and recorded in Liber 974, folio 13, of the land records of the District of Columbia.

Q. Is that an original paper? A. Yes, sir.

Q. Please state in whose handwriting that is. A. I would say it is in the handwriting of the notary who took the acknowledgment, Mr. John T. C. Clarke.

Q. Did you know Mr. Clarke? A. I did.

Q. Did you ever see him write? A. Oh, yes; I have seen his handwriting.

Q. What was the business of Mr. Clarke? A. He was a notary public, and justice of the peace.

Q. Was he a member of the bar? A. I believe not.

Q. Please state from your knowledge of Mr. Clarke and from your experience as a lawyer what ability Mr. Clarke had in drafting deeds in trust conveyances and technical legal papers.

Objection to this question as irrelevant and immaterial, and for the further reason that it is not shown that this witness had knowledge or the means of acquiring knowledge of Mr. Clarke's abilities in the direction inquired about, and for the further reason that if the parties to this transaction employed Mr. Clarke to prepare this deed they are estopped to deny his ability and capacity, particularly after the deeds have remained of record for so many years, and particularly in view of the fact that a subsequent deed was prepared purporting to correct the deed now in question.

A. As I have known Mr. Clarke for a number of years and knew of his capacity in the line of the knowledge of the law and the want of it, and knew that he was not competent to deal with the question that was involved in that deed. In other words that he was legally incompetent to draw a deed of that character for the purpose of doing what the deed was probably intended to do. He was not learned in the law.

I object to the answer and move to strike it out. I particularly object to and move to strike out the expression "What the deed was probably intended to do", because it is a mere speculation and I interpose this objection at this time after the answer is made, because that part of the answer is not re-ponsive to the question and could not have been anticipated in any objection that might have been made before the answer was given.

106 Q. How long have you been practicing law in this District? A. I was admitted to the bar in 1868, October, I think, 1868, and have been practicing since that time.

Q. Mr. Cull, is Mr. Clarke, the justice of the peace to whom you

referred living at the present time? A. No, sir, he is dead.

Q. I will ask you to look at this deed dated the 19th of May, 1881, from George M. Nichols and wife to William F. Poulton, and state if you know the signature of the subscribing witness and what his name is. A. The subscribing witness is John T. Clarke, who is also the notary taking the acknowledgement. I know his signature.

Yes, that is John T. C. Clarke's signature.

Q. I offer in evidence a deed from George M. Nichols and wife, to William F. Poulton, trustee, above identified by Mr. Cull, and request the Examiner to mark it "Complainants' Exhibit, Original deed, No. 2." I hand you the paper writing, Mr. Cull, and ask you to identify it. A. It is an original deed from George M. Nichols and wife Catherine, to William F. Poulton, as trustee for Susan Fitzgerald, dated November 19, 1869, and recorded in liber 601, folio 442, of the land records of the District of Columbia.

Q. Please state how that deed is witnessed and proven. A. The deed is witnessed by John T. C. Clarke, the notary public who takes

the acknowledgement of the grantors.

Q. You are familiar with the signatures? A. Yes.

Q. Is that John T. C. Clarke's signature? A. I believe 107 it is, from my knowledge of his writing.

Q. I now offer the deed above identified in evidence and request the Examiner to mark it "Complainants' Exhibit Original deed, No. 1." In whose handwriting is this deed which you have just identified? A. I would say it was the same handwriting as the man who took the acknowledgement.

Mr. Cull: As I opened this deed, the deed tears somewhat in the crease of it.

Mr. Clagett: Do you know where I have obtained these original deeds just offered in evidence.

Objected to as immaterial.

A. You obtained them from me, and I obtained them from Mr. R. Harrison Johnson, manager of Mrs. Fitzgerald's estate. I don't know what connection Mr. Harrison Johnson has with her estate. I examined the title to the property contained in the deeds at the request of R. Harrison Johnson and made report on the title. Subsequent to making the examination of title, those deeds were brought to me by Mr. Johnson and remained in my possession until I was asked for them by Mr. Clagett, and I gave them to him.

Q. Mr. Cull, I hand you bill of complaint in this cause and ask you to look at the description therein and say whether or not the property described in these two deeds is the same property mentioned and described in the bill of complaint. A. In answer to that I would have to say that the property described in the bill is a part

of the property conveyed by these two deeds I have just identified. In other words, these two deeds embrace the prop-108erty described in the bill of complaint, excluding the except-

ing clause, of course.

Q. Mr. Cull, I hand you the original deed of Nichols and wife to William F. Poulton, dated November 19, 1869, marked "Complainants' Exhibit, original deed, No. 1," and ask you whether or not the form upon which said deed is drawn is the proper form to draw a trust deed.

I object to that question as incompetent and irrelevant, and immaterial. It sheds no light upon the issue involved here, which is an alleged mistake in the deed, and further because it calls for an opinion upon a question of law which is for the court itself to determine upon inspection of the deed now in evidence.

A. This deed is a printed form of deed intended to convey a fee simple title to land in the District of Columbia and the party who filled in the blanks in writing-in other words, drew the deed, as we call it—has attempted to convert it into a deed in trust, and whether or not the party carried out the intention or not is something I don't know. The language of the deed does whatever it does.

Q. Mr. Cull, will you please look at the habendum clause of that deed and say whether there is any blank there for limiting an estate

to the cestui que trust?

Objected to as incompetent, irrelevant and immaterial upon the grounds stated with reference to the last question and further because an inspection of the deed itself will best determine this question if it be material.

A. The deed has no blank to the habendum in order to declare properly a trust estate and is not a deed that I would 109 have used for that purpose—not a form which I would have

used for that purpose.

Q. Mr. Cull, you have stated that you have been practicing law here since 1868. Would you please state at what branch of the law your principal practice has been? A. I have made a specialty of real estate law. I have practiced other law, too, more in my early practice than for a good many years past. My specialty has been real estate law for many years.

Q. At the present time, are you connected with any Title Company, and if so, in what capacity? A. I am President of the Home Title Insurance Company.

Cross-examination by Mr. MILLAN:

Q. Did you say John T. C. Clarke is dead? A. Yes.

Q. About when did he die? A. A number of years ago. I don't know when. I knew him a number of years. I tried cases before him as Justice of the Peace.

Q. Was he an old man? A. Yes.

Q. Quite an old man when he died? A. Yes.

Q. I understood you in your direct testimony when you testified as to the handwriting of these deeds, to say you would say the body of the deed was in the same handwriting as the signature of the notary? A. Yes.

Q. And I noticed that before making those answers, in each case you made a careful inspection of the deed itself?

A. Yes.

Q. Is your statement that the deeds are in the handwriting of John T. C. Clarke based upon a comparison of the signature with the body of the deed, or upon your own knowledge of his handwriting? A. I can say from the best of memory that I have seen a good deal of John T. C. Clarke's handwriting, especially his signa-

ture. I am not an expert, but I know that signature.

Q. I am assuming that this is his genuine signature, and my question is how do you arrive at the fact that the body of the deeds is in his handwriting. Whether by comparison with the signature or by your knowledge of his handwriting? A. I arrived at my opinion that the deed was written by Mr. Clarke from what I believe to be my knowledge of Mr. Clarke's handwriting. Of course, I had to read the deed to identify his handwriting and compare it with my memory.

Q. About how long after 1881, to your best recollection, did Mr. Clarke live? A. Well, I can't say. I was not intimately acquainted with Mr. Clarke, and was not an associate of Mr. Clarke's and his life and death were matters which were rather immaterial to me.

Q. During what period was this that you were trying cases before him and enjoying an acquaintance with him? A. Sometime after I was admitted to the bar.

Q. In 1864? A. In 1868.

Q. Was he quite an old man in 1881. A. Yes, quite old. Yes, I would say that he was a fairly old man. His ap-

pearance and gray hairs all indicated it.

Q. Now, I ask you to look at these two deeds, one dated in 1869 and one in 1881, and state whether or not in your opinion the deed in 1881 does not bear throughout evidences of being written in a firmer and smoother hand than the body of the deed in 1869. A. I think it bears throughout absolute identity of having been written by the same man. The ink and pen would account for its variation, whatever there is, but there is no variation in the writing.

Q. Now, I would direct your attention to the habendum clause of the deed of 1869, being the deed which is drawn on the printed form.

I understood you to say that there was no space there for properly limiting an estate in fee to the cestui que trust. Is that what you said? A. And that is absolutely correct, unless you use the space

between the lines and made a very short trust clause.

Q. And now I want to call your attention to the fact that following the name "Susan Fitzgerald" in the fourth line of the clause on the second page of the deed, which clause begins "to have and to hold" there is almost a full line of space and that following the word "to" in the next line there is about one-third of a line of space. Do you observe those facts to be as indicated. A. I observe those facts to be as indicated, and I also observe the additional fact that as

stated above the deed is a printed form for a deed in fee and

112 not in trust, and that the make up of that habendum clause, if they intended to convey the property to Mr. Poulton in trust for Susan Fitzgerald, was done by a person absolutely ignorant of the law, because it is not a properly constructed instrument.

Objected to the latter part of the answer beginning with "I also observe," because it is not responsive to my question and is a voluntary and gratuitous statement on the part of the witness.

Mr. Brown: I insist upon allowing Mr. Cull to complete his statement and complete his explanation and counsel can except to it if he desires to do so, but I do not wish the witness to be asked a question on the cross examination and then be cut off and prevented

from stating what he had to say in reply to it.

Mr. MILLAN: Witness has already gone far beyond the limits of the question asked, as indicated in my objection, and if he desires to make any further explanation or volunteer any statement on his own behalf or on behalf of anybody else, I prefer that he do so on re-direct examination, as is regular, proper, and usual, the question being solely whether he observed certain spaces on the deed as I pointed them out to him.

Mr. Brown requests the witness to proceed.

Mr. Millan objects and asks to have the matter certified to court, and asks Mr. Examiner if he is to be interferred with.

Mr. Brown: The Examiner has no power to rule on this question whatever. If you think there is anything irregular you can object but you cannot stop the witness from saying anything he

wants to say. Mr. Cull, if you have not finished your answer to the last question and have anything further to say in answer to it or in explanation of your answer I ask you to proceed.

Mr. Millan: If Mr. Cull had not completed his answer he was entitled to complete it, subject to proper objections. The ground of my objection and the basis of all this somewhat heated controversy that has taken place was that Mr. Cull had absolutely completed his answer and coming to a full pause. A long objection had been recorded and then he had made an attempt to begin with a voluntary statement at a time when no question was pending. I repeat that if he had not completed his answer he was entitled to complete it.

Mr. Cull: I have no desire to make a voluntary statement. I only thought at the time I started to say something that was interrupted that I might make my previous answer a little plainer. I

would have said this, that in constructing a deed in trust the property is first conveyed by the grantor to the grantee absolutely; that is followed by a habendum in which or following which is declared the trust that you intend to put in your trust deed. This form is a printed form intended to convey a fee simple, and if the deed had been prepared as I would have prepared it or any other lawyer skilled in real estate law, what they would have said instead of what is said in this deed would have been this: "To have and to hold the said piece or parcel of said granting premises and appurtenances unto

the said party of the second part, his heirs and assigns, unto their use or unto and to the use of the said party of the sec-114 ond part, his heirs and assigns, in trust nevertheless for the given purposes." This particular paper as to its habendum says: "Unto the party of the second part, his heirs and assigns, as trustee aforesaid of the said Susan Fitzgerald to her sole use, benefit and behoof forever," which is an improper construction of the trust clause. It is all a matter of improper construction of the trust clause.

Mr. MILLAN: The question which I asked Mr. Cull was solely whether he observed from the physical inspection of the deed certain blank spaces which I pointed out to him. Therefore the whole of this last statement which he has volunteered is not responsive to

my question, and I move to strike it out.

Mr. MILLAN: Mr. Cull, this deed is entirely effective to convey a trust estate for the life of Susan Fitzgerald, is it not?

Objected to by Mr. Clagett on the ground that that is a question for the court to decide.

Mr. MILLAN: I would like the witness to answer.

A. I think the deed is unquestionably effective to give her a life estate at least.

Q. Now, Mr. Cull, look at the first of the spaces to which I call your attention and state whether there was not ample room to insert after the name "Susan Fitzgerald" in the fourth line of the habendum clause the words "her heirs and assigns forever." A. As

I have said before, or attempted to say, the declaration of a 115 trust estate in the place that Mr. Millan indicates would have been an improper place to put it for the purpose of constructing it.

Objection to this answer by Mr. Millan and move to strike out as not responsive to the question.

Witness adds to that: That the space indicated is an improper

place to put a trust clause and not a sufficient place either.

Mr. MILLAN: My question was whether or not in the fourth line of this habendum clause and after the name "Susan Fitzgerald," there was room to insert the words "her heirs and assigns forever."

A. There was a blank space there that you could have written that many words in, and any other words of the same number and length.

Q. Now, I want to call your attention to the second space to which I previously directed your attention in the fifth line of the

habendum clause, where the word "her" now appears, and ask you whether or not there was room in that space to have written the words "her" or "their." A. Yes, certainly; why, of course.

Redirect examination by Mr. CLAGETT:

Q. Mr. Cull, will you please again look at this same deed recorded in Liber 601, folio 442 and state from your knowledge as a conveyancer and real estate lawyer, what are the appropriate words to create a life estate in trust with remainder over to the grantor?

Objected to as not proper re-direct examination, and as irrelevant, incompetent and immaterial, because it sheds no light upon the question here involved which is whether the parties made a 116 mistake with respect to these deeds, there being no evidence on the record to show what the intention of the parties was or these deeds did not correctly carry out their intention and agreement.

A. That is purely a legal question, or a question calling purely for a legal opinion. One form of words might have been used or another form of words might have been used to accomplish that purpose properly. There might have been a declaration following the habendum, in which there should have been a limitation not only unto the trustees but to the use of him. There might have been following that a declaration that it was for the life of a given person with remainder over to the grantor or anybody else, or there might have been words that it was for the life of a given person and stopped right there. In which event there would have been an equitable estate created for the person in whom it was declared, and the balance of the estate in fee would have remained where it was in the first place, subject to the life estate.

That is all.

JUDSON T. CULL, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of —, 1909. - —, Examiner.

Whereupon Mrs. Lucy A. Cunningham, a witness produced on behalf of the complainant, was recalled and testified as follows:

117 Q. Mrs. Cunningham, you are a daughter of George M. Nichols, are you not? A. Yes.

Q. Do you know the signature of your father and mother? A.

I think so.

Q. I hand you a paper filed in this cause and marked "Complainant's Exhibit, original deed No. 1," and I will ask you to look at the signature of George M. Nichols and Catherine Nichols to this deed and state whose signatures they are. A. I think they are my father's and mother's without a doubt. I have not seen any of their writing for sometime, but I know this is their writing.

Q. I now hand you a paper that has been offered in evidence in this case and marked "Complainant's Exhibit original deed No. 2," and I will ask you to look at the signatures to this deed "George

M. Nichols" and "Catherine Nichols" and state whose signatures they are. A. I think they are just the same.

Q. What do you mean by that? A. I think they are my father's

and mother's. They look like it.

Mr. MILLAN: We admit on behalf of the defendants that these are the genuine signatures of the parties referred to.

LUCY A. CUNNINGHAM, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of ——, 1909. - —, Examiner.

- Whereupon Mr. Charles C. Clarke, a witness of lawful 118 age, was produced on behalf of complainant, and after being first duly sworn, testified as follows:
- Q. Mr. Clarke, what is your business? A. I am superintendant of construction.

Q. For whom? A. Pavarini and Wyne.

Q. Who was your father? A. John T. C. Clarke. Q. What was his business? A. Notary public and justice of the peace.

Q. Is he living? —.

Q. When did he die? A. I think in 1886 or 1887. I am not

positive which. I was away at the time.

Q. I hand you deed which has been offered in evidence in this case and marked "Complainants' Exhibit, original deed, No. 1," and I wish you would look at the handwriting of this deed and state if you can whose handwriting it is. A. I have examined it and it is my father's handwriting.

Q. I call your attention to the signature of the subscribing witness in this case, John T. C. Clarke. Will you state whose signature that

is? A. My father's signature.

Q. I call your attention now to the signature of John T. C. Clarke, Justice of the Peace, to the acknowledgment. A. That is my father's signature.

Q. I now hand you, Mr. Clarke, a paper which has been filed in this case and marked "Complainants' Exhibit original 119 deed, No. 2," and ask you to state if you can in whose handwriting this paper is? A. My father's.

Q. I now call your attention to the signature of the subscribing witness to this deed, John T. C. Clarke, and ask you to state whose

signature this is. A. My father's.

Q. I now call your attention to the signature of John T. C. Clarke, Notary Public, to the acknowledgment. Can you state whose that is? A. My father's.

That is all.

No cross-examination.

CHARLES C. CLARKE, By W. L. BROWNING, Examiner.

Subscribed and sworn to before me this — day of —, 1909. —, Examiner. Whereupon William F. Poulton, a witness of lawful age, was recalled for the complainant, and testified as follows:

Objection if this witness is recalled for the purpose of being examined with reference to any matter that was overlooked by counsel on former examination. I have no objection to his being examined

with reference to such matters as I do not wish to be captious, but I reserve the right to object to his recall, and I do object in so far as he shall be examined concerning any matters with respect to which he testified on his former examination, his

examination having been completed and he having been discharged.

Mr. Brown: Before proceeding to examine this witness I want to offer in evidence a duly certified copy of a deed in fee simple from William F. Poulton, trustee, to Susan Fitzgerald, dated May 31, 1870, and purporting to convey to Susan Fitzgerald in fee simple the same property described in "Complainants' Exhibits, Original deeds, numbered one and two," I ask the Examiner to mark this deed "Complainants' Exhibit William F. Poulton deed, No. 1." I also offer in evidence certified copy of a deed in fee simple from William F. Poulton, trustee to Susan Fitzgerald, dated the 21st of May, 1881, purporting to convey to Susan Fitzgerald, in fee simple the same property described in "Complainants' Exhibit original deeds numbered 1 and 2," and I ask the Examiner to mark this "Complainants' Exhibits, William F. Poulton deed, No. 2."

I also offer in evidence the certified copy of a deed from Susan Fitzgerald to Kate Seligman, dated 27th day of October, 1890, and purporting to convey to Kate Seligman in fee simple part of the property described in "Complainants' Exhibits, original deeds No-. 1 and 2," said property being part of said property in said square 385, fronting on C Street, and a building thereon, and I ask the Examiner to mark this "Complainants' Exhibit, Fitzgerald-Selig-

man."

Mr. Millan: Before any of these papers are admitted in evidence I object to them on the ground that they are irrelevant and immaterial to any issue in this cause. The power of the trustee to convey and the measure of the estate which the trustee took and which Susan Fitzgerald took are to be determined by the original deeds from Nichols and wife to Poulton, trustee, and the fact that the trustee and Mrs. Fitzgerald afterwards undertook to convey in fee would not enlarge the estate which they received under the original deeds, and would not shed any light upon the fact whether a mistake was made in the preparation of the original deeds.

Mr. Brown: I now offer in evidence a paper signed by J. T. Petty, Assistant Assessor of the District of Columbia, purporting to be a transcript of the records in the Assessor's Office showing the tax assessment from the year 1869 to 1909 on the property described in the bill of complaint in this case. I might add in explanation of this transcript that Helen A. Herman mentioned therein is the owner of the portion of the property fronting on C Street by conveyances from Kate Seligman. I ask the Examiner to mark this paper "Complainants' Exhibit, transcript of Tax Assessment."

Mr. MILLAN: I waive any objection to the failure to prove this

paper, and am willing to admit that it is what it purports to be, but I object to its admissibility for any purpose on the ground that it is irrelevant and immaterial. I also object to that part of the statement of counsel to the effect that Helen A. Herman owns a part of this property under conveyance from Kate Seligman, if it is intended to assume from that statement that the trustee Poulton or Mrs. Fitzgerald had a right to convey a title in fee simple to Mrs.

Seligman or Mrs. Seligman the right to convey such a title to Mrs. Herman. If counsel simply means that Mrs. Seligman made a deed to Mrs. Herman, I will take his word for it.

Mr. Brown: I simply made the statement about Mrs. Herman in explanation of her name being on the transcript.

Q. Now, Mr. Poulton, I hand you a certified copy of the deed from William F. Poulton, trustee, to Susan Fitzgerald, dated May 31, 1870, and recorded August 11, 1870, same being "Complainants' Exhibit, William F. Poulton, deed No. 1" purporting to convey from William F. Poulton, trustee, to Susan Fitzgerald, the property described therein in fee simple and will ask you if you recollect making that deed to Mrs. Fitzgerald? A. Oh, yes; I remember.

Q. Where did you execute the original of that deed?

Objected to as irrelevant and immaterial.

A. At Mr. Clark's Office.

Q. What Mr. Clarke? Give his full name? A. John T. C. Clarke; I believe that is his name.

Q. What was his business? A. He was a justice of the peace and esquire.

Q. How did you come to go there to execute that deed?

Objected to for the reasons last stated.

A. Well, I went to transfer the property over to Mrs. Fitzgerald again and I was notified to come there at a certain day, the papers would be all ready to be signed, and I went there and signed it.

Q. What authority did you have to execute that deed to Mrs. Fitagerald?

Objected to as immaterial, irrelevant, and calling for a conclusion of law of law. Authority to execute it must be had from the original deeds now on file in evidence.

Q. Now answer the question. A. Well, I had authority for us to turn it over again and I don't know the reason that she bought it in my name, but there was nothing more than to transfer it to her when she wanted it again. The reason she bought it in my name was she did not want her husband to know she had the money, and wanted to invest it for safe keeping. She would not put it in bank or anything like that.

Q. Who asked you to go there and execute it? A. She told me. Q. Who do you mean by she? A. Mrs. Fitzgerald. She said that she wanted the property transferred back again. She had Mr. Clarke draw up these deeds and when they were ready for me I went there and signed. I met Mr. and Mrs. Nichols and Mrs. Fitzgerald at the office waiting for me to come.

Q. Do you mean George M. Nichols and Catherine Nichols? A. Yes, George M. Nichols. That was the name.

Q. Did they know you were conveying it back to Mrs. Fitzgerald? A. Yes, I was acquainted with him at that time but I have never

seen him since more than once or twice but not to speak to.

Q. Now, Mr. Poulton, I hand you another paper purporting to be a deed from William F. Poulton, trustee, to Susan Fitzgerald, dated the 21st day of May, 1881, and recorded May 23, 1881, the

same being a deed from William F. Poulton, purporting to convey to Susan Fitzgerald in fee simple the property described therein, this paper being marked "Complainants' Exhibit, William F. Poulton deed, No. 2.", dated 1881, and I ask you if you remember anything about that paper. A. Yes, I remember all about these papers, Mr. Brown.

Q. How did you come to execute that second deed? A. Well, when she got ready to have it transferred back again, of course I

was ready at any time to turn it over to her.

Q. Where did you execute that second deed? A. These papers were executed in Squire Clarke's office.

Q. John T. C. Clarke? A. Yes, John T. C. Clarke. All the busi-

ness was done there.

- Q. Who was present when you executed that deed? A. The same parties. Mr. Nichols and wife, Mr. Clarke and myself, and Mrs. Fitzgerald that was.
- Q. Did George M. Nichols and Catherine Nichols know that you were making that deed in fee simple to Susan Fitzgerald?

Objection to the question as calling for conclusion of witness.

A. Yes, sir. I am satisfied that they did.

Objection to answer as stating conclusion of witness.

Q. Now, Mr. Poulton, did George M. Nichols ever visit Mrs. Fitzgerald after she moved into the property she purchased under these deeds?

Objected to as irrelevant and immaterial.

A. Oh, yes, him and his wife both. They lived in the country. They used to come in and stop at Mrs. Fitzgerald's and take lunch.

Q. How long were you living on this property with Mrs. Fitz-gerald after she moved in? A. I lived there until she bought that

property on 8th Street.

Q. How long was that? A. Oh, I guess it was 10 or 12 years, I guess from the time she bought the property. I lived there all the time until she moved on 8th street. I don't know the time exactly. I lived there from the time she bought it until she moved away on 7th Street there, and boarded at that house all the time.

Q. How often would Mr. and Mrs. Nichols visit Mrs. Fitzgerald

at that place?

Objected to as irrelevant.

A. Not so very often. When they came to town to shop she 9-2135A

stopped there because it was about the only place-would stop to lunch and for a talk with the old lady.

Q. Do you remember when Mrs. Fitzgerald built that house on

the rear of the lot fronting on C Street?

Objected to as irrelevant and immaterial for the reason that it has already been gone into when this witness was testifying before.

A. About two years after she moved in the house she made the

improvements on the rear on C Street.

Q. Did Mr. and Mrs. Nichols see these buildings in the course of improvement? A. Oh, yes, certainly. She has been at the house when these buildings were going up and would remark what improvements she made and would go out and look at them, 126 and after it was finished she was there and saw what Mrs.

Fitzgerald had done with improvements, and Mr. Nichols was there. Q. Did they go through them? A. I don't think so. It was

rented at that time.

Q. You were living at the house at that time? A. Oh, yes, I was living at the house.

Q. Did Mr. and Mrs. Nichols make any objections to her making improvements of that character?

Objected to as irrelevant, immaterial and incompetent for any purpose.

A. They never made any objections. They only spoke in favor of it. Said it was nice improvements and all that, and she said they wished they had been able to have done it.

Q. Mr. Poulton, you knew Mrs. Fitzgerald intimately up to the time of her death, of course, for you afterwards married her? A.

Q. What claim, if any, did she make in regard to the ownership of that property from the time after she acquired it to the time of

Objected to on the ground that it is not competent unless it be shown that those claims, if any, were made in the hearing of George W. Nichols and Catherine Nichols and assented to by them, and on the further — that such claims if made, would have been self-serving declarations. I further object to the question because it is leading.

A. I knew the property belonged to her and when she got ready for it to be transferred over to her again there was no trouble about that. I was willing to turn it right back to her again when she was ready to have it done. She owned the property and had it for rent and claimed it. Of course she claimed the property

Q. I mean did she claim to be the owner in fee simple and to have the absolute title?

Objected to for the reasons heretofore stated, namely that such claim would be a self-serving declaration and is incompetent unless made in the presence of and hearing of George M. Nichols and Catherine Nichols, and assented to by them. I also object to the question because it was leading, and I object on the further ground that this matter was fully inquired into when this witness was previously on the stand.

A. Certainly, she did. There was never anything in question after she bought it. There was never anything said about the matter. I knew she bought it in fee simple. She would not have bought it if she had not been buying it that way.

Objection to the last part of his answer, and motion to strike out, as it is his argument and inference.

Q. In the conversations between George M. Nichols and his wife and Mrs. Fitzgerald on the occasions when they called there and saw these improvements going up, was there anything in the conversations of George M. Nichols and Catherine Nichols, his wife, to indicate that they did claim any interest of any kind or had any

128 interest of any kind in any of this property?

Objected to because, first, it is leading, and second because it assumes that there were conversations on this subject as to which the witness has not yet testified. Third, because it was not incumbent upon George M. Nichols and Catherine Nichols to make any such claim in the face of the original deeds which have been introduced here. Fourth, because the question asks for a conclusion of this witness from the conversation and not for the *the* conversation itself. Fifth, because this whole matter has been inquired into when the witness was previously on the stand.

A. No, there was not. They always seemed very pleasant and there was nothing said about his having any interest in it after they had sold it. They talked over the improvements and that was about all. I did not have time to listen to their talk much when they visited. I remember once when Mr. Nichols came in after he had sold his property. He wanted to borrow some money, but I don't remember whether he got it or not.

Q. Who did you say came in to borrow money? A. Mr. Nichols. Q. George M. Nichols? A. Yes. That was a year or so after.

Q. Mr. Poulton, I hand you "Complainants' Exhibits, original deeds No-. 1 and 2" and ask you if these deeds were ever in your possession. A. Yes, I had them for years. Always took care of them. I had a safe to put these deeds in and I took care of them for Mrs. Fitzgerald.

Q. When did you part with them? A. Well, let's see. It has been about a year since I turned them over to Mr.

Johnson.

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Q. Who? A. Mr. Johnson.

Q. R. Harrison Johnson? A. Yes. I told him I had some deeds and I turned them over to him.

Q. What did he have to do with it? A. He had the renting of it.

Q. The real estate agent, you mean? A. Yes.

Q. You turned them over to Mr. Johnson? A. Yes. I believe it was right after the sale.

Cross-examination:

Q. Mr. Poulton, when you signed this deed, you did it in May, the thirty-first, 1870, from yourself to Mrs. Fitzgerald? A. Yes.

Q. I think you said you signed at Mr. Clarke's office? A. I think

I did.

Q. Well are you positive about that? A. Well, I am satisfied that

that is right. I think it was Mr. Clarke's office.

Q. That is rather important. I would like to ask you if you are certain? A. I never expected anything like this, but I think so because I was asked by Mrs. Fitzgerald who notified me when the papers were ready to be signed, and I made it a point to.

Q. Do what she asked? A. No, to sign it. 130

Q. Mrs. Fitzgerald asked you? A. She notified me when the papers were drawn up.

Q. Did anybody else notify you? A. No.

Q. How did you know? A. She told me she would have the

property transferred over to me.

Q. You thought because Mrs. Fitzgerald told you that there was to be some papers to be signed? A. When the time came I went and signed the papers.

Q. She asked you to go? A. She notified me. Of course I

thought it was between me and her.

Q. Did anybody else notify you? A. No, nobody else knew about it.

Q. Did anybody else know you were going? A. No.

Q. Then if you are not certain whether you signed them at Mr. Clarke's office of course you don't know who was there? A. Yes, I know who was there, at Mr. Clarke's as well as anybody else.

Q. I will ask my question again. Did you sign in his office or

somewhere else? A. I signed in his office.

Q. But you are not positive? A. Yes, I am positive.

papers I signed were in his office.

Q. Do you remember how long it was after Mrs. Fitz-131 gerald notified you to go that you went to sign this first deed? A. Really I don't know that, how long it was.

Q. Who went with you? A. I went by myself. Mrs. Fitzgerald

and Nichols and his wife went I think from their house.

Q. Did they all meet you there? A. I met them there.

Q. Were they all there? A. Yes.

Q. Did you have any conversation with them? A. No conversation, just passed the time of day. There was some little talk maybe. I don't remember what it was now.

Q. You don't remember any conversation that took place?

Nothing more than that I knew what I went for.

Q. You went to sign those papers because Mrs. Fitzgerald notified you to go? A. Yes, she notified me.

Q. Who presented the paper when you got there? A. The papers

were in Mr. Clarke's office and in his hands.

Q. And he handed it to you? A. I read it over of course and signed the papers, yes.

Q. Where was George M. Nichols living at that time? A. He was

living in the country when he was at home.

Q. I am talking now about the time this first deed was made in 1870. A. I don't know whether he was in the city or not. He was in the grocery business in the city for a little while.

Q. I think you said on your direct examination that after the first deeds were made from Mr. Nichols and wife to you that you did not hear the ownership of the property talked about at all. You only heard the improvements talked about. A. Oh, I heard some little talk about the ownership of the property.

Q. What did you hear? A. I can't remember back about what I

heard talk about.

Q. You never heard any question raised about the ownership? A. It was not discussed. There was no necessity for it. After she bought the property I had no chance to hear any talk about it.

Q. And you did not hear any talk? A. No, I did not hear any

particular talk, only what was said as to what I thought of it.

Q. Did you, or not, hear any talk about it between Mrs. Nichols and Mrs. Fitzgerald except in connection with the improvements? A. They talked about it whenever they met, of course.

Q. What did they say? A. Well, I was not there to hear what they said. I heard Mrs. Fitzgerald say that Mrs. Nichols had been

here today, and all that.

Q. You did not hear a great deal of talk yourself. All the talk you heard was about the improvements? A. I heard lots of talk outside of improvements. I mean between Mr. Nichols

and Mrs. Fitzgerald. I heard them talk about the improvements and they thought it was a very nice piece of improvements. There was an old vacant lot and when it was cleared up and built up it was a nice improvement.

. Q. Do you remember anything else they talked about? A. No, I can't say anything else particular they talked about. I had other

business to attend to.

Q. Of course you did, and therefore did not hear the talk. A. No,

I thought everything was all right. I was perfectly satisfied.

Q. Now, in 1881, when you made this second deed to Susan Fitz-gerald, where was that deed signed? A. These papers were all signed at Squire Clarke's office.

Q. Where was it? A. On Twelfth Street, near up until he died.

Q. Mrs. Fitzgerald notified you to go that time? A. She notified me when I had to come to sign the papers.

Q. Anybody else? A. No, sir.

Q. When did you marry Mrs. Fitzgerald? A. It has been about six years ago.

Q. Just a short while before she died, then? A. Yes, just before

she died.

- Q. Who went with you this second time when the deed of 1881 was signed? A. Nobody.
- Q. Who did you find at the office then? A. The same party. Q. What do you mean by the same party? A. Nichols and his wife and Mrs. Fitzgerald.

Q. Did you have any conversation with anybody at that time? A. No, I only passed the time of day.

Q. Just like you did before? A. Yes. They were just like

strangers to me.

Q. You had not much acquaintance with them? A. Only when they made this transfer of the property.

Q. Who presented the paper to you this time? A. Squire Clarke,

who attended to all her business for her.

Q. Was there anybody else in Squire Clarke's office on either of these occasions? A. I think his son was there once, but not the one who was here today. The one there at that time is dead.

Q. Is there anybody else there who is living? A. No.

Q. All dead except yourself? A. I think so. I don't know whether Mr. Nichols and his wife are dead or not. I know the rest are.

Q. Did you ever see Mr. Nichols after that deed of 1881 was signed? A. I have seen him, yes.

Q. Have any conversation with him? A. Nothing only to pass

the time of day.

Q. Now after this deed was made to you in 1869, did you yourself have any conversation with Mr. Nichols between 135 that time and the time you met him at Squire Clarke's office? A. No. No conversation about this property at any time.

Q. After you went to Squire Clarke's office in 1870 between that time and the time you went to make the next deed in 1881, did you have any conversation with him about this property? A. No.

Q. Did you ever at any time either before or after the making of these deeds have any conversation with him? A. No, I never had any conversation with him about the property at all.

That is all.

Redirect examination by Mr. Brown:

Q. What do you mean by that, by not having any conversation with him? A. I mean when I met him there was nothing said about the property between him and me. We knew each other just in a social way. We got slightly acquainted while him and Mrs. Fitzgerald was bargaining about this business. I had no conversation with him particularly.

Q. You heard his conversations with Mrs. Fitzgerald? A. Everything seemed to be pleasant as far as I could see and when

he would be calling on Mrs. Fitzgerald.

Q. While directing these improvements you would hear some of his conversation, would you not?

Objected to, having been gone fully into on direct examination.

136 A. I heard but nothing about the property when he was calling on her. He was there many a time when I was not there. I would hear that Mr. and Mrs. Nichols was at the house, and all like that, but they lived a little distance out and whenever they came in Mrs. Nichols would always call there and I would hear of it.

Q. You would drop in sometimes when they were there? A. Not more than once or twice, Mr. Brown. Maybe afterwards I would see her on the street.

Q. Mr. Poulton, you have no interest in this property at the present time? A. I have no interest now. I signed it all away.

Q. Under the will of Mrs. Fitzgerald you were left a legacy of five hundred dollars, were you not? A. Yes.

Q. And you received that a long time ago. A. Yes.

Q. Then you have no present interest in this property we were talking about? Λ . Not in that, no sir.

WILLIAM F. POULTON, By W. L. BROWNING, Examiner.

Subscriber and sworn to before me this — day of ——, 1909. ——, Examiner.

Whereupon R. Harrison Johnson, a witness on behalf of the complainant, was recalled and testified as follows:

Q. Mr. Johnson, I hand you two deeds marked "Complainant's Exhibits, original deeds No. 1 and 2, and wish to ask you if these deeds were ever in your possession. A. The two deeds referred to were given to me by Mr. Poulton about a year ago.

Q. How long did you retain possession of them? A. They were turned over to Mr. Cull, who was the Examiner of title, at my

request.

Q. Did you turn them over to Mr. Cull? A. I did.

Q. They had been in your possession from the time Mr. Poulton gave them to you until you turned them over to Mr. Cull? A. They had.

Q. Mr. Johnson, you are familiar with the property described

in this bill of complaint? A. I am.

Q. You have been the real estate agent collecting rents for this property for some time? A. I have.

Q. Were you collecting rents for Mrs. Poulton at the time of her

death? A. I was not.

Q. Did you collect rents previously to her death? A. Not of this property, but of other property.

Q. After her death did you collect rents for this property? A.

I did.

Q. Who for? A. For the trustee, Mr. James H. Taylor. Q. He was trustee under the will of Susan Poulton? A. He was.

Q. Up to what time did you collect rents for Mr. Taylor? A. I say up to the time, well, about twenty (20) months ago.

Q. Since that time who has been in possession of the property? A. It has been vacant up to about December, 1907. I should say from about August or July, 1907, to December, 1907, and a Mr. Brisman has been in possession since that time, December 1907.

Q. How did he happen to come into possession of the property? A. He had some idea of buying the property, made an offer on it. The property was in bad shape, subject to depredation and was

being abused by the boys in the neighborhood—damaged, rather.— He was allowed to go in there somewhat in the nature of a caretaker for Mr. Taylor, trustee.

Q. Who did he make this offer of purchase to? A. To me, as

agent for Mr. Taylor, trustee.

Cross-examination:

Q. Mr. Johnson, you collected these rents of which you speak, for Mr. Taylor, trustee, and accounted to him for them, did you? A. I did.

That is all.

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R. HARRISON JOHNSON, By W. L. BROWNING, Examiner.

Mr. Clagett: I will make a statement. I have had a great deal of difficulty in collecting the testimony in this case, owing to the fact that this transaction occurred in 1869, and that is one of the reasons why the evidence has been to a great extent in piece meal.

I object to this statement as irrelevant, immaterial and move to strike out.

Mr. Clagett: Before the suit was filed I asked Mr. Judson T. Cull, who examined the title for the purchase of the property, and gave him a reference to all deeds which would be of use in preparing a bill in equity.

Same objection and same motion.

Mr. Clagett: Mr. Cull failed to give me a reference to the deeds from Poulton to Mrs. Fitzgerald. I only learned the existence of these deeds since the last session of taking testimony, and this made it necessary to recall Mr. Poulton. Mr. Brown also was ignorant of this fact. In the last six hours, although I have vigorously and diligently been making an endeavor to find someone who was related to Mr. Clarke, a justice of the peace. I finally located Mr. Charles Clarke, his son. Mr. Clarke told me as he left the room that

it is possible he may have some papers at home of his father's bearing upon the transfer of the property in suit. He will look it up to-night and let me know in the morning, and we desire Mr. Millan to give us a day or so to ascertain whether or not we desire to take further testimony coming from Mr. Clarke of the character above mentioned. If he has any material evidence, and Mr. Millan should not desire to give us this extension, we will ask the court to give us an extension for a few days. I learned about the deeds in evidence executed in 1881 by hunting up the owner of the property on C Street which was a part of the original lot conveyed by George M. Nichols and wife to Mr. Poulton, trustee. I called upon Mr. Herman, the husband of the present owner, and he told

me that Mr. Tobriner examined the title. Mr. Tobriner was very much exercised over the matter and immediately hunted through his files and found his certificate of title, and upon handing to me for examination, I noticed the deeds, had certified copies made and shortly thereafter again interviewed Mr. Poulton and recalled them to his mind, when he told me he recollected the circumstances as to the deed executed in 1881 very clearly. That is all.

Mr. MILLAN: Mr. Clagett's examination not having been conducted by question and answer, but in one continuous statement it has been impossible for me to object to the testimony before it was given. I now object to all of this statement as irrelevant and immaterial. I object to the portions of it which detail his conversations with other parties as hearsay. I will make my reply to the request for an extension of time after the necessity for it becomes apparent.

Mr. Brown: Mr. Clagett, what effort have you made to find parties who might be acquainted with George M. Nichols and

141 his wife, Catherine, and with Susan Fitzgerald?

Objected to because irrelevant, incompetent, and immaterial, particularly because efforts to secure evidence can in no wise supply the failure to produce it.

A. I spent the greater part of four or five days in interviewing elderly people in southwest Washington in the neighborhood of this property, going to see elderly people who have been suggested to me by others living in the neighborhood as possibly knowing something about it, and every witness who knows anything whatsoever about this transfer made in 1869 and who could testify to any statement or declarations made by either Mr. Nichols or Mrs. Fitzgerald, has been produced. I think I have exhausted the field in search for witnesses.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 27954.

James H. Taylor, Executor and Trustee, et al., Plaintiffs, v.

Lucy A. Cunningham et al., Defendants.

The Examiner who reported the depositions in this cause being ill and unable to certify and return the same, it is hereby stipulated and agreed by and between counsel for all the parties, that the depositions of witnesses for the complainants, as reported in the seventy-four pages of typewritten matter hereto attached, may be filed in the cause and read in evidence without certification by the Examiner or signing by the witnesses as fully, to all intents and purposes, as if so signed and certified.

It is further agreed that if the Examiner should, during the progress of the cause, become able to make the usual certificate, the depositions may, with the Court's consent, be withdrawn for that purpose; also, that he may hereafter make the usual certificate with reference to his fee for taking the same. It is not intended by this stipulation to waive any objections to testimony made during the taking of said depositions and shown by the record.

CHARLES W. CLAGETT. PERCIVAL M. BROWN. MILLAN & SMITH.

143 "COMPLAINANTS' EXHIBIT (CROWN TESTIMONY) No. 1."

APRIL 12, 190-.

April 12, 1869.

Frame house and lot sold under deed of trust by Todd For 985—one half cash the ballance in 6 and 12 months 100 paid down on day of sale to Wheeler—Co trustees.

"Complainants' Exhibit (Crown Testimony) No. 2."

Part of lot- No. 3 and 4 in square No. 385 fronting Maryland Ave. 29-9 inches then north and out with Maryland Avenue 65 6 inches to the line of said lot 73-6 inches.

Bought in April, 1869.

144 4 Internal Revenue Stamps. 1 Internal Rev. Stamp.

COMPLAINANTS' EXHIBIT (ORIGINAL DEED) No. 1.

This indenture, made this nineteenth day of November, in the year of our Lord one thousand eight hundred and sixty-nine, between George M. Nichols and Katherine Nichols, his wife, of Washington city, in the District of Columbia, of the first part, and William F. Poulton, of the same place, trustee for Susan Fitzgerald, wife of Edward Fitzgerald, of the second part, witnesseth, That the said parties of the first part, for and in consideration of the sum of four thousand dollars, in lawful money of the United States to them in hand paid by the said party of the second part, at and before the sealing and delivery of these presents, the receipts whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released and conveyed, and do by these presents, grant, bargain, sell alien, enfeoff release and convey unto the said party of the second part his heirs and assigns forever, for the sole use, benefit, and behoof of the said Susan Fitzgerald, and not subject to the control or disposal of her husband, or liable for his debts, all that certain piece or parcel of ground situate in the City of Washington, in the District of Columbia, being known and described as being a part of lot numbered five (5) in square numbered three hundred and eighty-five (385) and being described as follows: Beginning for the same at the southeastern corner of said lot numbered five (5) and running thence southwesterly along Maryland avenue thirty-two (32) feet

and nine (9) inches; thence northwesterly and at right angles with said Avenue, sixty-nine (69) feet and six (6) inches; thence north to south C Street, thence east along said street, twenty-six (26) feet six and a half (6½) inches to the northeastern corner of said lot numbered eight (8); thence south thirty-nine (39) feet and eight (8) inches and thence to said avenue and the place of beginning being the lot lettered "A" in the recorded subdivision of lots in said square and being a part of the real estate of which the late George Hercus died seized.

Together with all the improvements, ways easements, rights, privileges, and appurtenances to the same belonging, or in any wise appertaining, and all the remainders, reversions, rents, issues and profits, thereof, and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise, however, of the said parties of the first part, of, in, to or out of the said piece or parcel of

ground and premises.

To have and to gold the said piece or parcel of ground and premises and appurtenances, unto the said party of the second part, his heirs and assigns, as trustee as aforesaid of the said Susan Fitzgerald, to

her sole use, benefit, and behoof forever.

And the said parties of the first part, for themselves, their heirs, executors, and administrators do hereby covenant, promise and agree, to and with the said party of the second part his heirs and assigns, that they the said parties of the first part and their heirs, shall and will warrant and forever defend the said piece or parcel of ground and premises and appurtenances, unto the said party of the

second part, his heirs and assigns, from and against the claims of all persons claiming or to claim the same, or any part thereof, by from, under or through them, or any of them.

And further, that they the said parties of the first part and their heirs shall and will, at any and all times hereafter, upon the request and at the cost of the said party of the second part, his heirs or assigns, make and execute all such other deed or deeds or other assurance in law, for the more certain and effectual conveyance of the said piece or parcel of ground and premises and appurtenances, unto the said party of the second part, his heirs or assigns, as the said party of the second part, his heirs or assigns, or his counsel learned in the law shall advise, devise or require.

In testimony whereof, the said parties of the first part have bereunto set their hands and seals on the day and year first hereinbefore

written.

GEORGE M. NICHOLS. [SEAL.] CATHERINE NICHOLS. [SEAL.]

Signed, sealed and delivered in the presence of JOHN T. C. CLARKE.

DISTRICT OF COLUMBIA, County of Washington, 88:

I, John T. C. Clarke, a Justice of the Peace in and for the county aforesaid, in the said District do hereby certify, that George M.

Nichols and Catherine Nichols, his wife, parties to a certain Deed, bearing date on the 19th day of November, A. D., 1869, and hereto annexed, personally appeared before me in the county and

147 District aforesaid the said George M. Nichols and Catherine Nichols, his wife, being personally well known to me to be the persons who executed the said Deed, and acknowledged the same to be their act and deed; and the said Catherine Nichols wife of the said George M. Nichols being by me examined privily and apart from her husband and having the Deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and seal this 19th day of November, A. D.

1869.

JOHN T. C. CLARKE, J. P.

(Endorsed:) 10 35 Received for record and recorded on the 22 day of Nov., A. D. 1869 in Liber-No. 601 folio 442, one of the Land Records for Washington County, in the District of Columbia & Ex'd by S. Wolf, Recorder.

COMPLAINANTS' EXHIBIT (ORIGINAL DEED) No. 2. 148

This Indenture, made this 19th day of May, in the year of our Lord Eighteen hundred and eighty-one, by and between George M. Nichols, and Catherine Nichols, his wife, of Montgomery County, of the State of Maryland, of the first part, and William F. Poulton, of Washington City, District of Columbia, Trustee for Susan Fitzgerald, wife of Edward Fitzgerald of the second part, witnesseth; That whereas the said parties of the first part heretofore by a deed dated November nineteenth, in the year eighteen hundred and sixtynine, conveyed unto the said party of the second part, part of lot numbered five, in square numbered three hundred and eighty-five, and erroneously omitted to include in said deed part of lot eight (8) in said square, the two portions of said lots numbered five (5) and eight (8) being the lot marked "A," in the subdivision of lots in said square and a part of the real estate of which the late George Hercus died seized, to correct the said error and omission.

Now, this indenture further witnesseth: That the said parties of the first part, for and in consideration of the sum of five dollars lawful money of the United States to them in hand paid by the said party of the second part at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened enfeoffed, released, and conveyed, and do by these presents grant, bargain, sell, alien, enfeoff, release and convey

unto the said party of the second part, his heirs, and assigns for ever, for the sole use, benefit, and behoof of the said 149 Susan Fitzgerald, and not subject to the control or disposal of her husband, or liable for his debts, all those certain pieces and parcels of ground situate, in the city of Washington, in the District of Columbia, being known and described as parts of lots numbered

five (5) and eight (8), in square numbered three hundred and eighty-five (385), and being described as follows: Beginning for the same at the southeastern corner of said lot numbered five (5) and thence running southwestwardly along Maryland Avenue thirty-two (32) feet and nine (9) inches; thence northwestwardly, and at right angles with said avenue, sixty-nine (69) feet and six (6) inches; thence north to south C street; thence east along said street twenty-six (26) feet and six and a half (61/2) inches to the northeastern Corner of said lot numbered eight (8); thence south thirty-nine (39) feet and eight (8) inches, and thence to said avenue and the place of beginning, being the lot marked "A" in the subdivision of lots in said quare; together with all the improvements, ways, easements, rights, privileges, and appurtenances, to the same belonging, or in any wise appertaining and all the remainders reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand, either at law or in equity, or otherwise, however, of the said parties of the first part, of in, to, or out of the said pieces or parcels of ground and premises. Have and To Hold the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part, his heirs,

and assigns, as trustee as aforesaid of the said Susan Fitzgerald, to her sole use, benefit, and behoof forever. And the said

parties of the first part for themselves, their heirs, executors, and administrators, do hereby covenant, promise, and agree, to and with the said party of the second part, his heirs, and assigns, that they the said parties of the first part, and their heirs, shall and will warrant and forever defend the said pieces or parcels of ground and premises and appurtenances, unto the said party of the second part, his heirs, and assigns, from and against the claims of all persons, claiming or to claim the same, or any part thereof, by, from, under, or through them, or any of them. And further, that the said parties of the first part, and their heirs, shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, his heirs, or assigns, make and execute all such other deed, or deeds, or other assurance in law, for the more certain and effectual conveyance of the said pieces or parcels of ground and premises and appurtenances unto the said party of the second part, his heirs, or assigns, as the said party of the second part his heirs, or assigns, or their counsel learned in the law shall advise, devise or require.

In Testimony Whereof, the said parties of the first part have hereunto set their hands and seals, on the day and year first here-

inbefore written.

GEO. M. NICHOLS. [SEAL.] CATHERINE NICHOLS. [SEAL.]

Signed sealed and delivered in the presence of JOHN T. C. CLARKE.

151 DISTRICT OF COLUMBIA, Washington County, 88:

I, John T. C. Clarke, a Notary Public in and for the County and District aforesaid, do hereby certify that George M. Nichols and Catherine Nichols, his wife, parties to a certain deed bearing date on the 19th day of May A. D. 1881, and hereto annexed, personally appeared before me in the county aforesaid, the said George M. Nichols and Catherine Nichols, his wife, being personally well known to me to be the persons who executed the said deed, and acknowledged the same to be their act and deed; and the said Catherine Nichols, wife of the said George M. Nichols, being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

Given under my hand and notarial seal this 21st day of May A. D.

1881.

[SEAL.]

JOHN T. C. CLARKE, Notary Public.

11 a. m. Received for Record May 23 1881 and Recorded in Liber No. 974--folio 13—et seq.—one of the Land Records of the District of Columbia and examined by Geo. F. Schayer, Dep. Recorder.

152 Liber 620, Folio 383 et seq. M. G. N.

COMPLAINANTS' EXHIBIT WM. F. POULTON DEED No. 1.

Deed.

Recorded August 11, 1870, 10.30 A. M.

William F. Poulton, Tr., to Susan Fitzgerald.

Stamp 5.00.

This indenture, made this Thirty-first day of May in the year of our Lord one thousand eight hundred & seventy between William F. Poulton, of Washington City, in the District of Columbia, Trustee for Susan Fitzgerald, of the first part, and Susan Fitzgerald of the same place, of the second part. Witnesseth, that the said party of the first part for and in consideration of the sum of one dollar in lawful money of the United States to him in hand paid by the said party of the second part at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged hath granted, bargained, sold, aliened, enfeoffed, released and conveyed and do by these presents grant, bargain, sell, alien, enfeoff, release and convey unto the said party of the second part her heirs and assigns forever, all that certain piece or parcel of ground situate in the City of Washington in the District of Columbia being known

and described as being a part of Lot numbered Five (5) in Square numbered Three hundred and eighty-five (385) and being described as follows: Beginning for the same at the southeastern corner of said Lot numbered Five (5) and running thence Southwestwardly along Maryland Avenue Thirty-two (32) feet and nine (9)

153 inches; thence Northwestwardly and at right angles with said Avenue, Sixty-nine (69) feet and six (6) inches; thence North to South C Street; thence East along said Street twenty-six (26) feet and six $(6\frac{1}{2})$, and a half inches to the Northeastern corner of said lot numbered Eight (8) thence South thirty-nine (39) feet and eight (8) inches; and thence to said Avenue and the place of beginning being the lot lettered A. in the recorded Subdivision of lots in said Square, being a part of the Real Estate of which the late George Hercus died seized and which was conveyed to the said William F. Poulton as Trustee for the said Susan Fitzgerald by George M. Nichols and Catherine Nichols his wife by their deeds bearing date on the Nineteenth day of November eighteen hundred and Sixty-nine. Together with all the improvements, ways, easements, rights, privileges and appurtenances to the same belonging or in anywise appertaining and all the remainders reversions, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand either at law or in equity or otherwise however of the said party of the first part of, in, to or out of the said piece or parcel of ground and premises.

To have and to hold the said piece or parcel of ground and premises and appurtenances unto the said party of the second part her heirs and assigns to her sole use, benefit and behoof forever. And the said party of the first part for himself, his heirs, executors and administrators does hereby covenant, promise and agree to and with the said party of the second part, her heirs and assigns, that he, the said party of the first part and his heirs shall and will warrant

and forever defend the said piece or parcel of ground and premises and appurtenances unto the said party of the second part her heirs and assigns from and against the claims of all persons claming or to claim the same or any part thereof, by from, under or through him, them or any of them. And further, that he, the said party of the first part and his heirs & will at any and all times hereafter upon the request and at the cost of the said party of the second part her heirs or assigns, make and execute all such other deed or deeds or other assurance in law for the more certain and effectual conveyance of the said piece or parcel of ground and premises and appurtenances unto the said party of the second part her heirs or assigns, or their counsel learned in the law shall advise, devise, or require.

In testimony whereof, the said party of the first part has hereunto set his hand and seal on the day and year first hereinbefore written.

WM. F. POULTON. [SEAL.]

Signed, sealed and delivered in the presence of: JOHN T. C. CLARKE. RICHARD HARRIS.

DISTRICT OF COLUMBIA,
County of Washington, 88:

I, John T. C. Clarke, a Justice of the Peace in and for the County aforesaid, in the said District, do hereby certify that William F. Poulton, Trustee for Susan Fitzgerald, party to a certain Deed bear-

ing date on the 31st day of May A. D., 1870 and hereto annexed, personally appeared before me in the County and District aforesaid the said William F. Poulton, being personally well known to me to be the person who executed the said deed and acknowledged the same to be his act and deed. Given under my hand & seal this 31st day of May A. D. 1870.

JOHN T. C. CLARKE, J. P. [SEAL.]

OFFICE OF THE RECORDER OF DEEDS,
DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 620, folio 383 et seq., one of the Land Records of the District of Columbia.

In testimony whereof I have hereunto set my hand and affixed

the seal of this office this 22nd day of June, A. D., 1909.

[SEAL.]

R. W. DUTTON,
Deputy Recorder of Deeds, D. C.

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Liber 974, Folio 16. M. G. N.

COMPLAINANTS' EXHIRIT WM. F. POULTON DEED No. 2.

Deed.

Recorded May 23, 1881, 11 A. M.

William F. Poulton, Tr., to Susan Fitzgerald.

This Indenture, made this twenty-first day of May in the year of our Lord one thousand eight hundred and eighty one, by and between William F. Poulton, of Washington City, District of Columbia, trustee for Susan Fitzgerald of the first part, and Susan Fitzgerald, of the said City and District, of the second part: Witnesseth, that the said party of the first part for and in consideration of the sum of One Dollars, in lawful money of the United States, to him in hand paid by the said party of the second part, at and before the sealing and delivery of these presents the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, enfeoffed, released, and conveyed, and doth by these presents, grant, bargain, sell alien, enfeoff, release, and convey unto the said party of the second part, her heirs and assigns forever, the following described real estate, situate, lying, and being in the City of Washington, Dis-

trict of Columbia, being known and described as part of lots numbered five (5) and eight (8) in square numbered three hundred and eighty-five (385), and being described as follows:

Beginning for the same at the Southeastern corner of said lot numbered five (5) and thence running southwestwardly along Maryland Avenue thirty-two (32) feet and nine (9) 157 inches; thence Northwestwardly and at right angles with said Avenue, sixty-nine (69) feet and six inches (6); thence North to South C. Street; thence East along said street twenty-six (26) feet and six and a half (61/2) inches to the Northeastern corner of said lot numbered eight (8)—thence South thirty-nine (39) feet and eight (8) inches, and thence to said avenue and the place of beginning being the lot marked "A" in the subdivision of lots in said Square. Together with all the improvements, ways, easements, rights, privileges, appurtenances and hereditaments to the same belonging, or in anywise appertaining, and all the remainders, reversions, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, and demand whatsoever, either at law or in equity, of the said party of the first part, of, in, to, or out of the said pieces or parcels of land and premises. To Have and To Hold the said pieces or parcels of land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their sole use, benefit, and behoof forever. And the said party of the first part, for himself, his heirs executors, and administrators, doth hereby covenant, promise and agree to and with the said party of the second part, her heirs and assigns, that he, the said party of the first part and his heirs, shall and will warrant and forever defend the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, her heirs and assigns, from

and against the claims of all persons claiming or to claim the same, or any part thereof, by, from, under and through him, them or any of them. And further, that he, the said party of the first part and his heirs shall and will, at any and at all times hereafter, upon the request and at the cost of the said party of the second part, her heirs or assigns, make and execute all such other Deed or Deeds or other assurances in law for the more certain and effectual conveyance of the said pieces or parcels of land and premises and appurtenances, unto the said party of the second part, her heirs or assigns, as the said party of the second part, her heirs or assigns, or their counsel learned in the law, shall advise, devise or require.

In Testimony Whereof, the said party of the first part has hereunto set his hand and seal, on the day and year first hereinbefore

written.

WM. F. POULTON. [SEAL.]

Signed sealed and delivered in the presence of— JOHN T. C. CLARKE. DISTRICT OF COLUMBIA, County of Washington, ss:

I, John T. C. Clarke, a Notary Public in and for the District aforesaid, do hereby certify, that William F. Poulton, party to a certain Deed, bearing date on the Twenty-first day of May, A. D. 1881, and hereunto annexed, personally appeared before me, in the District aforesaid, the said William F. Poulton being personally well known

to me to be the person who executed the said Deed, and acknowledged the same to be his act and deed. Given under 159 my hand and notarial seal, this 21st day of May, A. D., 1881.

[NOTARIAL SEAL.]

JOHN T. C. CLARKE, Notary Public.

OFFICE OF THE RECORDER OF DEEDS, DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber 974, folio 16, et seq., one of the Land Records of the District of Columbia.

In testimony whereof, I have hereunto set my hand and affixed

the seal of this office this 22d day of June, A. D. 1909.

SEAL.

R. W. DUTTON, Deputy Recorder of Deeds, D. C.

160 Liber No. 1541, Folio 114 et seq. M. G. N.

COMPLAINANTS' EXHIBIT FITZGERALD- SELIGMAN -..

Recorded Oct. 27", 1890, 1:43 P. M.

Susan Fitzgerald Kate Seligman.

Deed.

This Indenture, Made this Twenty-seventh day of October, in the year of our Lord one thousand eight hundred and ninety, by and between Susan Fitzgerald, (widow) of the City of Washington, District of Columbia, party of the first part and Kate Seligman of the City of Baltimore, State of Maryland party of the second part, Witnesseth, That the said party of the first part, for and in consideration of Fiftyone hundred and fifty (\$5150.00) dollars, lawful money to her in hand paid, by the party of the second part, the receipt of which before the sealing and delivery of these presents, is hereby acknowledged has given, granted, bargained and sold, aliened, enfeoffed, released, conveyed, and confirmed and does by these presents give, grant, bargain and sell, alien, enfeoff, release, convey and confirm, unto the party of the second part, her heirs and assigns forever the following described land and premises situate, lying and being in the City of Washington, District of Columbia and distinguished as

Part of Lot "A" in George C. Hercus' subdivision of lots five and eight, in square numbered three hundred and eighty-five (385) as per plat in Liber "W. F." folio 140 of the records of the Sur-

161 veyor's Office of said District. Beginning for the same at the Northwest corner of said lot "A" and running thence South on the East line of a six (6) foot Alley Fifty four 50/100 feet (54.50/100 ft.); thence in a Northeasterly direction, thirty 50/100 feet (30.50/100 ft.) to a point in the east line of said lot "A" distant forty-nine 75/100 feet, (49 75/100 ft.) on said line from "C" Street, thence North-westerly with said east line Ten 08/100 feet (10 08/100 ft.); and thence North with said line thirty-nine 67/100 feet (39 67/100 ft.) to said C Street; and thence with the South line of said Street west, Twenty-six 54/100 feet, (26 54/100 ft.) to the place of beginning; together with all and singular the improvements ways, easements, rights, privileges, and appurtenances to the same belonging, or in anywise appertaining and all the estate, right title, interest and claim either at law or in equity, or otherwise however, of the party of the party of the first part, of, in, to, or out of the said land and premises. To Have and To Hold, the said land and premises and appurtenances, unto and to the only use of the party of the second part, her heirs and assigns, forever. And the said party of the first part, for herself, her heirs, executors, and administrators, does hereby covenant, and agree, to and with the party of the second part, her heirs, and assigns, that she is the party of the first part, and her heirs, shall and will warrant and forever defend the said land and premises and appurtenances unto the party of the second part, her heirs and assigns, from and against the claims of all persons claiming

or to claim the same or any part thereof, or interest therein, by from under, or through her, them, or any of them.

And further that the party of the first part and her heirs shall and will at any and all times hereafter, upon the request, and at the cost of the party of the second part, her heirs or assigns, make and execute all such other deed or deeds, or other assurance in law, for the more certain and effectual conveyance of the said land and premises and appurtenances, unto the party of the second part, his heirs or assigns, as the party of the second part, her heirs or assigns or her or their counsel, learned in the law, shall advise, devise, or require. In Testimony Whereof, the party of the first part, has

hereunto set her hand and seal, on the day and year first hereinbefore written.

SUSAN FITZGERALD. [SEAL.]

Signed, sealed and delivered in the presence of— JOSEPH J. McNALLY.

DISTRICT OF COLUMBIA, To wit:

I, Joseph J. McNally, a Notary Public, in and for the said District hereby certify that Susan Fitzgerald, (widow) party to a certain Deed, bearing date on the Twenty-seventh (27th) day of October, A. D. 1890, and hereto annexed, personally appeared before me, in the said District, the said Susan Fitzgerald, (widow), being

personally well known to me to be the person who executed the said Deed, and acknowledged the same to be her act and deed.

Given under my hand and official seal, this twenty-seventh (27)

day of October, A. D. 1890.

[NOTARIAL SEAL.]

JOSEPH J. McNALLY, Notary Public, D. C.

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OFFICE OF THE RECORDER OF DEEDS, DISTRICT OF COLUMBIA.

This is to certify that the foregoing is a true and verified copy of an Instrument as recorded in Liber 1541 Folio 114 et seq., one of the Land Records of the District of Columbia.

In Testimony Whereof, I have hereunto set my hand and affixed

the seal of this office this 18th day of June A. D., 1909.

SEAL.

R. W. DUTTON, Deputy Recorder of Deeds, D. C.

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Decree.

Filed Dec. 6, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

JAMES H. TAYLOR, Executor and Trustee, Plaintiff, Lucy A. Cunningham et al., Defendants.

This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it is this 6th day of December, 1909, adjudged, ordered and decreed as follows, viz:

That the deed from George M. Nichols and Catherine Nichols, his wife, to William F. Poulton, trustee, dated the nineteenth day of November, A. D. One Thousand Eight Hundred and sixty-nine, and recorded in Liber numbered Six Hundred and one (601), Folio numbered Four Hundred and forty-two (442), et seq., one of the Land Records of the District of Columbia, and the deed from George M. Nichols and Catherine Nichols, his wife, to William F. Poulton, trustee, dated the nineteenth day of May, A. D. One Thousand Eight Hundred and eighty-one, and recorded in Liber numbered Nine Hundred and seventy-four (974) folio numbered thirteen (13), et seq. one of the Land Records of the District of Columbia, be, and the same are hereby reformed by inserting in the granting clause of each of said deeds after the words "trustee for Susan Fitzgerald, wife

of Edward Fitzgerald," the words, "her heirs and assigns forever"; and by inserting in the habendum clause of each of 165 said deeds, after the words, "as trustee as aforesaid of the said Susan Fitzgerald," the words, "her heirs and assigns forever."

It is further adjudged, ordered and decreed:

That the fee simple title to the real estate described in the sixth paragraph of the Bill of Complaint filed in the above entitled cause be, and the same is hereby vested in James H. Taylor, trustee to sell, appointed by this court in the cause of James H. Taylor, executor and trustee, et al., vs. Anna May Ruppert, et al., Equity No. 27,212, filed in this court, and that the defendants named in said Bill of Complaint be, and they are hereby directed to convey by a deed in fee simple the real estate described in said Bill of Complaint to said James H. Taylor, his heirs and assigns, as trustee as aforesaid; in default of said conveyance, it is adjudged, ordered and decreed:

That this decree shall stand for a deed.

It is further ordered, that complainants shall recover their costs against the defendants to be taxed by the Clerk of the Court and that the complainant- may have execution therefor as at law.

THOMAS H. ANDERSON, Justice.

From the foregoing decree the defendants pray, in open court, an appeal to the Court of Appeals of the District of Columbia and the bond for costs on Appeal is fixed at One Hundred Dollars, with leave

to the defendants to make a cash deposit of \$50.00 in lieu thereof and leave to the guardian ad litem for the infant defendants to join in the prosecution of said appeal and in said bond, on their behalf, this 6th day of December, 1909.

THOMAS H. ANDERSON, Justice.

Memorandum.

December 30, 1909.—\$50.00 deposited by appellants in lieu of appeal bond.

Directions to Clerk for Preparation of Transcript of Record.

Filed Jan. 14, 1910.

In the Supreme Court of the District of Columbia.

Equity. No. 27954.

James H. Taylor, Executor and Trustee, etc., et al., Plaintiffs, vs.

Lucy A. Cunningham et al.

The Clerk of the Court will prepare transcript of record on appeal in this case, including therein the following:

1. Original Bill filed July 24, 1908, with Exhibits thereto attached, except Exhibits E and F, which exclude, because found elsewhere in record.

2. Answer of Lucy A. Cunningham and others filed December 9, 1908.

3. Answer of E. Marshall Nichols and Allan G. Nichols, infants by guardian Ad Litem, filed October 17, 1908.

4. Replication to answers to original bill, filed June 1, 1909.

- 5. Cross Bill of Lucy A. Cunningham and another filed December 9, 1908.
- 6. Answer of Allan G. Nichols and E. Marshall Nichols, infants, guardian ad litem, to cross bill, filed March 11, 1909.

7. Answer of James H. Taylor and Lemuel T. Ergood to cross

bill, filed March 22, 1909.

8. Answer of Anna May Ruppert, infant by guardian ad litem, to cross bill, filed March 27, 1909.

9. Answer of Frances S. Nichols to cross bill, filed March 30, 1909.

10. Replication to answers to cross bill filed March 30, 1909.

11. All depositions of witnesses with exhibits thereto.

12. Decree filed December 6, 1909, with note in margin thereof fixing bond on appeal and noting appeal.

· 13. Note deposit of cash in lieu of appeal bond, December 30, 1909.

MILLAN & SMITH, Attorneys for Defendants and Cross-Complainants.

Please take notice that we have this day filed with the Clerk of the Supreme Court of the District of Columbia notice for the preparation of transcript of record on appeal in the above-styled cause, as aforesaid, and herein hand you copy of same, this 14th day of January A. D., 1910.

MILLAN & SMITH, Attorneys for Defendants and Cross-Complainants.

To Messrs. Percival M. Brown, Chas. W. Clagett, and James A. Toomey, Attorneys for Complainants.

Service of copy of foregoing notice and designation acknowledged this — day of January, A. D., 1910.

PERCIVAL M. BROWN, JAMES A. TOOMEY, Attorneys for Complainants.

Memorandum.

February 8, 1910.—Time in which to file Transcript of Record extended to and including March 15th, 1910.

169 Supreme Court of the District of Columbia.

United States of America, District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from

1 to 168, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in Equity Cause No. 27954 wherein James H. Taylor, &c. et als. are Complainants and Lucy A. Cunningham, et als. are defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District,

this 15th day of March, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 2135. Lucy A. Cunningham et al., appellants, vs. James H. Taylor, &c., et al. Court of Appeals, District of Columbia. Filed Mar 15, 1910. Henry W. Hodges, clerk.

DISTRICT OF COLUMBIA

Jourt of Appeals, Astrict of Johnshia.

APRIL TERM, 1910.

No. 2135.

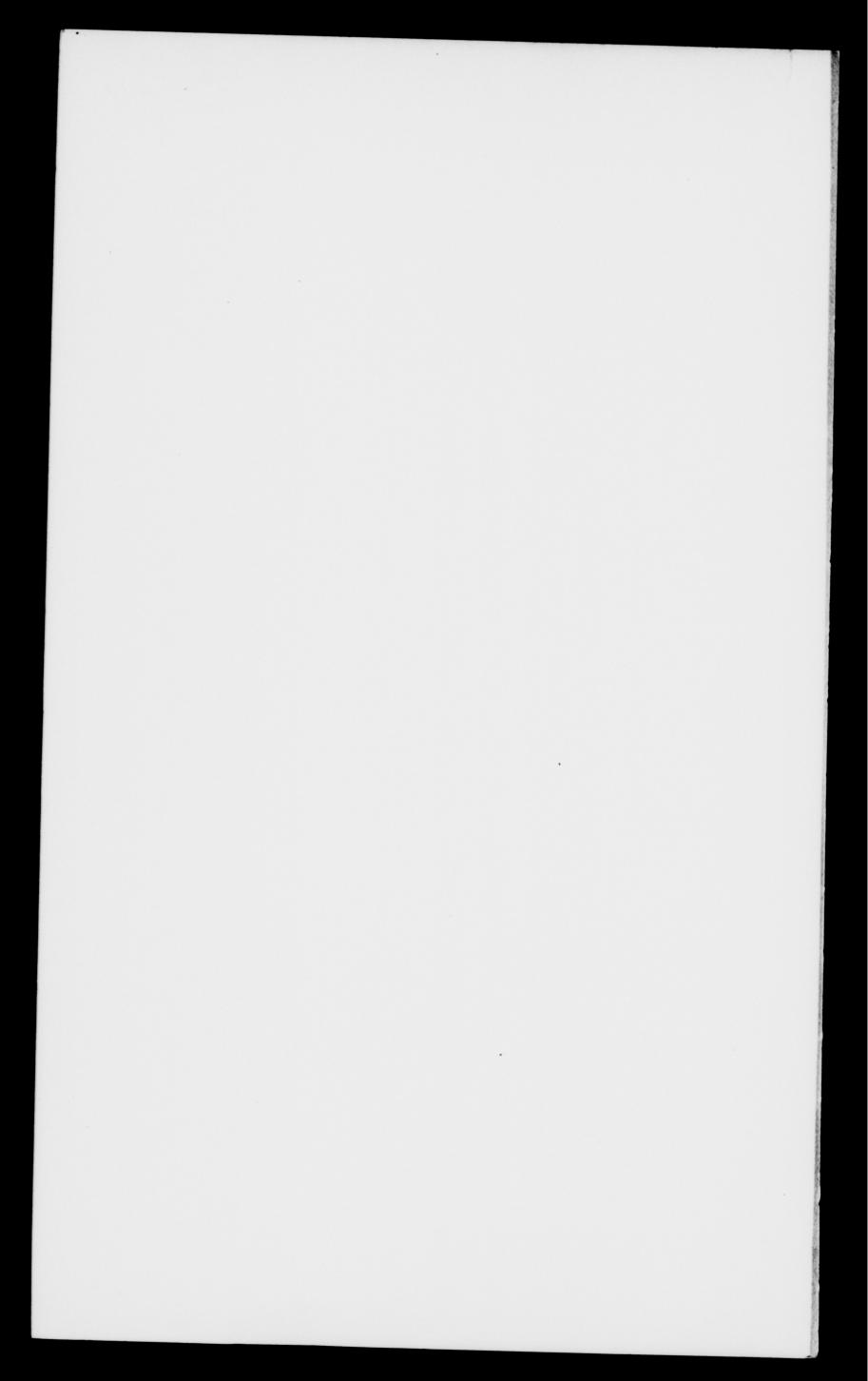
LUCY A. CUNNINGHAM, JAMES CUNNINGHAM, CATHERINE R. CONNER, JOHN W. CONNER, GEORGE W. NICHOLS, FRANCES S. NICHOLS, AND E. MARSHALL NICHOLS AND ALLEN G. NICHOLS, INFANTS, APPELLANTS,

vs.

JAMES H. TAYLOR, EXECUTOR AND TRUSTEE; LEMUEL TONER ERGOOD, AND ANNA MAY RUPPERT, INFANT, BY JAMES A. TOOMEY, HER NEXT FRIEND, APPELLEES.

BRIEF FOR APPELLANTS.

W. W. MILLAN, R. E. L. SMITH, Attorneys for Appellants.



Court of Appeals, Pistrict of Columbia.

APRIL TERM, 1910.

No. 2135.

LUCY A. CUNNINGHAM, JAMES CUNNINGHAM, CATHERINE R. CONNER, JOHN W. CONNER, GEORGE W. NICHOLS, FRANCES S. NICHOLS, AND E. MARSHALL NICHOLS AND ALLEN G. NICHOLS, INFANTS, APPELLANTS,

vs.

JAMES H. TAYLOR, EXECUTOR AND TRUSTEE; LEMUEL TONER ERGOOD, AND ANNA MAY RUPPERT, INFANT, BY JAMES A. TOOMEY, HER NEXT FRIEND, APPELLEES.

BRIEF FOR APPELLANTS.

Statement.

This is an appeal from a decree in equity granting the prayers of the bill of the appellees, who were plaintiffs below, and reforming certain deeds.

George M. Nichols and Catherine, his wife, on November 19, 1869, made a deed (Rec., pp. 5 and 74) conveying a

parcel of real estate in the District of Columbia to William F. Poulton, trustee, for Susan Fitzgerald, wife of Edward Fitzgerald. On the 19th of May, 1881, apparently for the purpose of correcting an error in the description of the property in said deed, a second deed was made between the same parties (Rec., pp. 6 and 76). Both deeds were duly recorded.

In both deeds the conveyance was expressed to be to—

"The party of the second part, his heirs and as-"signs forever for the sole use, benefit, and "behoof of the said Susan Fitzgerald and not sub-"ject to the control or disposal of her husband or "liable for his debts."

In each the habendum clause is as follows:

"To have and to hold the said piece or parcel of "ground and premises and appurtenances unto the said "party of the second part, his heirs and assigns, as "trustee, as aforesaid of the said Susan Fitzgerald, "to her sole use, benefit and behoof forever."

On May 31, 1870, Poulton, the trustee, though given no power so to do by the deed to him, undertook to convey in fee (Rec., p. 78) to the *cestui que trust*. May 21, 1881, after the making of the corrective deed, he again undertook (Rec., p. 80) to convey in fee to the *cestui que trust*. These deeds were duly recorded.

Mrs. Fitzgerald's husband died about 1866 (Rec., p. 33), and she afterwards married the trustee, Poulton (Rec., p. 33).

The effect of the deeds to Poulton, trustee, was to create a beneficial estate for life only in the cestui que trust. The bill, stripped of its verbiage and prolixity, contends (Rec., p. 7) that a mistake, mutual to the parties, was unwittingly made by the scrivener in drafting the deeds, and that the agreement and intention of the grantors and of said Susan Poulton (Fitzgerald) and said trustee was to vest a feesimple estate in the property described in said deeds in said

Susan Poulton. The bill further alleges that the price paid by Susan Poulton was the full value of the property, and that she and all others concerned supposed her title to be a fee. It is also alleged that she entered into possession of the property when the first deed was made and so continued until her death, September 7, 1903. It appears, however, by reference to copies of the deeds exhibited with the bill (Rec., pp. 74 and 76) that they covered more property than is now claimed by appellants, as shown by the sixth paragraph of their bill (Rec., pp. 4-5), and that on October 27, 1890, by deed duly recorded, Susan Poulton undertook to convey a portion of the property covered by said deeds to Kate Seligman, in fee (Rec., p. 82).

It is claimed in the bill that Mrs. Poulton's possession of the property was an adverse possession, but the case has not been presented upon that theory.

Susan Poulton left a will (Rec., p. 10), by which she devised all her property to appellee Taylor in trust, to sell and apply the proceeds for the benefit of Catherine Ruppert, daughter of testatrix (who, however, died in testatrix's lifetime), and after her death for the benefit of appellees, Lemuel Toner Ergood and Anna May Ruppert, grandchildren of testatrix. The will was duly probated. filed a suit in equity to execute his trust, obtained a decree directing the sale of the lands of testatrix (Rec., p. 13). endeavored to sell that portion of the land covered by the said trust deeds which remained to testatrix at her death. discovered the state of the title above disclosed, and filed the bill in this case to reform said deeds. He has been in possession and control of the property, collecting the rents and profits, since the death of testatrix (Rec., pp. 21 and 46).

George M. and Catherine Nichols died years ago, intestate (Rec., p. 8), and their heirs-at-law are defendants to the original bill. One son, George W. Nichols, named as a defendant, has disappeared (Rec., p. 8) and it is not known whether he is living. His children, infants, who are

his heirs-at-law if he is dead, and his wife (widow) made defendants. The infants filed a formal answer by guardian ad litem. The other defendants answered denying the right of the complainants to the relief prayed, and asserting that the deeds as drawn correctly express the intention of the parties, and that said Susan Poulton (Fitzgerald) took only a life estate (Rec., p. 15). At the same time two of the defendants, Lucy A. Cunningham and Catherine R. Conner, filed a cross-bill, making defendants all the other parties to the original bill except their respective husbands, James Cunningham and John W. Conner (unnecessary parties defendant in said original bill), praying to be put into possession of the property and that appellee Taylor be required to account for the rents and profits taken by him since the death of the testatrix (Rec., p. 19). Taylor and Ergood answered denying the equities of the cross-bill (Rec.. p. 23); the infants filed formal answers by guardian ad litem: Frances S. Nichols confessed the cross-bill (Rec., p. 27); George W. Nichols was not brought before the court by summons or publication on the cross-bill, no relief being prayed against him.

Issue was joined on the several answers. Plaintiffs in the original bill took testimony in support thereof and in opposition to the cross-bill. Defendants in the original bill, and plaintiffs in the cross-bill, rested upon the pleadings, and the testimony of the opposite side.

The court decreed (Rec., pp. 84-5), that the deeds be reformed so as to convey a fee to the cestui que trust and that title in fee to the property covered by said deeds, remaining to testatrix at her death, be vested in appellee Taylor: that the defendants be required to convey to him and that in default of such conveyance the decree stand for a deed and that the defendants pay costs.

The defendants appealed (Rec., p. 85). The effect of the decree sustaining the original bill is to denv relief on the cross-bill, but the latter was not, in terms, disposed of.

Assignment of Error.

The court below erred:

- 1. In holding the evidence sufficient to establish that the intention of the parties to the deeds in question was to convey a beneficial estate in fee to the cestui que trust;
- 2. In holding the evidence sufficient to establish that a mistake, mutual to the parties, was made in drafting the said deeds;
 - 3. In decreeing a reformation of said deeds;
- 4. In vesting the title to the property involved in appellee Taylor and requiring appellants to convey to him;
 - 5. In not dismissing the original bill;
 - 6. In failing to grant the relief prayed in the cross-bill;
- 7. In decreeing any relief under the original bill without having before the court all the parties claiming to own the property conveyed by the deeds sought to be reformed, the effect of the decree being to grant relief, as to the property conveyed by Susan Poulton to Kate Seligman, to parties who have not sued and whose identity is not disclosed.

Summary of the Evidence.

William A. H. Church, who testified for plaintiffs, was fifteen years old in 1869, when the first deed was made, and does not remember the condition of the property at that time; ten years later, in 1879, it was worth, he thinks, \$3,500 (Rec., p. 30). This testimony was objected to and is manifestly incompetent. If competent at all, it throws little light on the value of the property in 1869. Furthermore, witness shows on cross-examination (Rec., p. 31),

that he is not qualified to speak as to values, even in 1879. No other material fact was elicited from this witness, who was examined only as to values.

William F. Poulton, the trustee in said deeds, knew Mrs. Fitzgerald and her husband; knew George M. Nichols by sight but had no acquaintance with him; witness did not know he had been named as trustee until Mrs. Fitzgerald told him, after the deed had been made. She purchased the property outright as a home—not a life estate. ness heard her talk about what she intended to do with it. This testimony was objected to for reasons stated of record (Rec., p. 33). Mrs. Fitzgerald took the property in the name of a trustee because she did not want her husband to know that she had saved the money (See objection Rec., p. 33). He was a great drinker and they did not get along well together. She went to live in the property about four months after she bought it and painted it and put it in repair; also built two houses on the back of the lot, which fronted Maryland avenue and ran through to "C" street, and enlarged the improvements on the Maryland avenue end (Rec., p. 35). Several years after she moved out of the house and rented it and continued to collect the rents for about eighteen years—to the time of her death. knowledge of why the second deed was made.

Charles R. L. Crown was acquainted with values of reaf estate in the locality in question, in 1869 (Rec., p. 37). The improvements made by Mrs. Fitzgerald after she bought from Nichols would cost, at that time, about \$2,200 to \$2,500. Four thousand dollars represented the full value of the property covered by the deed from Nichols to Poulton, trustee (Rec., p. 39). He has no knowledge, save her statement, out of the presence of Nichols, that she gave \$4,000. This testimony is objected to (Rec., p. 40). It is the only evidence as to the price paid which was introduced.

R. Harrison Johnson, the next witness, was born the

year the first deed was made. He testified over objection (Rec., p. 41) as to the dilapidated condition of the property when he first knew it, fifteen years after the first deed was made and, still over objection (Rec., p. 42), to the present value of that portion of the property remaining in Susan Poulton at the time of her death, estimating it at \$2,800, and that its value now is ten or fifteen per cent. less than it was 25 years ago.

William B. Turpin testifies (Rec., pp. 43-4) as to the value in 1907 of the portion of the property remaining to Susan Poulton at her death, putting it at \$2,925, and that it has been worth no more during the time he has known it; his acquaintance with it began fifteen years after the first deed was made. All his testimony is objected to for reasons stated of record and it is submitted that it is irrelevant.

James H. Taylor, one of the plaintiffs, was examined (Rec., pp. 44-6), but no material fact was elicited. He says, over objection (Rec., p. 45), that he never heard of any claim to the property involved, on the part of the heirs of George M. Nichols until 1907 or the beginning of 1908.

Charles R. L. Crown recalled (Rec., pp. 47-9), testified, over objection as to value of some property in same neighborhood, which he bought in 1869, but no relevant or material fact was developed.

Mary L. Bamberger testifies (Rec., pp. 49-51) to no material fact save that Mrs. Fitzgerald improved the property. She states (Rec., p. 50) in a rather vague way that Mrs. Fitzgerald professed to own the property, but immediately afterwards, on cross-examination (Rec., p. 51), she testifies:

"Q. I understood you to say you never talked to her. Did you ever talk to her about her ownership of this property? "A. No.

"Q. She never said anything to you about it, or to anybody else in your presence?

"A. No, she did not."

Lucy A. Cunningham, one of the defendants, was called by the plaintiffs (Rec., p. 51). The most of her testimony seems to be wholly irrelevant and is objected to on that ground and upon other grounds stated of record. She proves that George M. and Catherine Nichols died years ago and that she and the other defendants are their heirs at law. George W. Nichols, a son, went to Panama and has not been heard from for about a year. E. Marshall Nichols and Allen G. Nichols, defendants, are his only children (Rec., p. 54).

Judson T. Cull, lawyer and title examiner, identifies the original deed of May 19, 1881, as being in the handwriting of John T. C. Clark, a notary public and justice of the peace, and testifies over objection (Rec., pp. 55-6) that Mr. Clark was not a lawyer and had not the skill to deal with the questions involved in trust deed in question. Clark is dead. Deed of November 19, 1869, is also in Clark's handwriting. It is on a printed form of the character used to convey an estate in fee; the party who drew the deed attempted to convert it into a deed in trust. The form has no blank to the habendum clause to declare properly a trust estate and is not a form witness would have used for that All this testimony is objected to for reasons stated of record (Rec., p. 57). He has made a specialty of real estate law and is president of a title company. On crossexamination (Rec., p. 60) says the deed is effective, notwithstanding the form used, to convey an estate in trust for the life of the cestui que trust. On the printed form there is room after the name of the cestui que trust in the habendum clause to insert the words "her heirs and assigns forever" (Rec., p. 60), and in the next line where the word "her" appears there is ample room to have placed "her or their." (The habendum clause would then have read:

"To have and to hold the said piece or parcel of "ground and premises and appurtenances unto the "said party of the second part, his heirs and assigns,

"as trustee as aforesaid of the said Susan Fitzgerald, "her heirs and assigns forever to her or their sole "use, benefit, and behoof forever.")

Lucy A. Cunningham, recalled, identifies the signatures of George M. and Catherine Nichols to the two deeds (Rec., p. 62).

Charles C. Clark proves the deeds to be in the hand-writing of John T. C. Clark, who was his father (Rec., p. 62).

William F. Poulton, recalled, is shown copies of deeds made by him to Susan Fitzgerald, May 31, 1870, and May 21, 1881 (Rec., pp. 64-5). They were executed at the office of John T. C. Clark. Mrs. Fitzgerald told witness she wanted the property and on each occasion told him to go to Mr. Clark's office and sign the deed. On each occasion he was met there by Mr. and Mrs. Nichols and Mrs. Fitzgerald. States over objection (Rec., p. 65), that he is satisfied Mr. and Mrs. Nichols knew he was making the deeds in fee to Mrs. Fitzgerald. Mr. and Mrs. Nichols visited Mrs. Fitzgerald after the first deed was made and knew she was improving the property. They made no objection; never heard them claim any interest in the property. This is objected to (Rec., pp. 66-7).

Note.—Attention is invited, in this connection, to the testimony of the witness on his first examination, that he had no acquaintance with George M. Nichols—had merely seen him so as to know him by sight (Rec., p. 33).

On cross-examination he says he heard Mr. Nichols and Mrs. Fitzgerald talk about the improvements she was making but not about the ownership of the property. When he signed the deeds of 1870 and 1881 there was no conversation whatever.

ARGUMENT.

A large number of objections to testimony, most of them well founded, were taken and the grounds thereof stated of record. The more important of them have been referred to in the foregoing summary.

No opinion was filed by the court below, but it is to be assumed that the learned justice who heard the cause excluded the improper testimony and still found enough in the record to convince his mind that a mistake, mutual to the parties, was made in the preparation of the deeds in question and that they ought to be reformed; that the parties had agreed, before the deeds were made, that the cestui que trust should take a beneficial estate in fee. It is submitted that the evidence is wholly insufficient to warrant such findings.

The sum total of the competent evidence is that in 1869 a trust deed was made, conveying a life estate to the cestui que trust; that twelve years later a deed to correct an error in description was made, and exactly the same character of estate conveyed; that in each case, about a year after the deed was made, the trustee deeded to the cestui que trust in fee, the original grantors being present but making no statement or declaration and signing no new papers; that the cestui que trust went into possession of the property and held it until her death (as she had the right to do) more than thirty years; that she made improvements; that the price named in the deed (there being no proof as to what was actually paid) represented the full value of the property.

All the assignments of error, except the seventh, present but one substantial ground of complaint, viz: insufficiency of proof, hence we discuss them together.

The deeds do not convey a fee, and do not on their face afford any evidence of intention so to do.

Notwithstanding the theory upon which the bill was framed at the hearing in the court below, appellee's counsel took the position that the deeds, whose reformation was prayed, were sufficient, properly interpreted, to convey a fee, and filed a brief in support of their contention.

As the same contention may be asserted here, we submit

that the point has been decided by this court.

"Where an estate is by deed conveyed to one and "his heirs, in trust for another, and there is no lim"itation over of the equitable estate to the heirs of
"the cestui que trust, either expressly or impliedly,
"the cestui que trust takes but a life estate, upon the
"determination of which the legal estate reverts to the
"grantor or his heirs."

Dengel vs. Brown, 1 App. D. C., 423.

The Supreme Court of the United States has said in respect of a trust deed:

"The quantity of the estate taken by the trustee "is that only which the purposes of the trust require." Young vs. Bradley, 101 U. S., 782.

To the same effect is Frey vs. Allen, 9 App. D. C., 400.

Indeed, so familiar and well settled is this doctrine that we refrain from further citations. It was entirely appropriate that the property should be conveyed to the trustee and his heirs, even though the intention were to give the cestui que trust a life estate only. This was necessary to provide against the failure of a trustee. Naturally, the grant would not have been to William F. Poulton, without any provision for the devolution of the title upon another trustee in case of his death in the lifetime of the cestui que

The appellee cited below a number of cases, none

of which applied to a case like the present.

The contention that the preparation of the deeds upon printed forms affords evidence that a mistake was made, utterly fails in view of the testimony of the witness Cull on cross-examination (Rec., pp. 59-60). In the first deed, the addition of four words in one place and two in another, where there were spaces ample to contain them, would have given the cestui que trust an estate in fee as effectively as could have been accomplished by any form of deed known to the law; and the deed as drawn gave her a life estate, with absolute certainty and effect. The second deed was not on a printed form, but written out in longhand by the scrivener.

Deeds may be reformed in proper cases, but the strictest proof is required.

We do not contend that a court of equity may not, in a proper case, decree the reformation of a deed. A proper case is:

"Where an instrument is drawn and executed, "which professes or is intended to carry into execu-"tion an agreement, whether in writing or by parol, "previously entered into, but which by mistake of "the draftsman, either as to fact or law, does not ful-"fill, or which violates the manifest intention of the "parties to the agreement." Hunt vs. Rhodes, 1 Pet. (U.S.), 1.

In the present case not a syllable of testimony as to what agreement was "previously entered into" has been introduced.

An absolute prerequisite to the exercise of the jurisdiction in question is the clearest and most satisfactory proof of a mistake. The rule is far stricter than in ordinary civil cases and borders on the strictness of the rule of criminal jurisprudence requiring proof beyond a reasonable doubt. Pomeroy's Equity Jurisprudence, Vol. II, Sec. 859, lays down the rule as follows:

"The authorities all require that the parol evi"dence of the mistake and of the alleged modifica"tion must be most clear and convincing, or else the
"mistake must be admitted by the opposite party;
"the result of the proof must be established beyond
"a reasonable doubt. Courts of equity do not grant
"this remedy upon a probability, nor upon a mere
"preponderance of the evidence, but only upon a
"certainty of the error."

This text is sustained, in substance, by almost numberless authorities:

Schott vs. Meredith, 197 Pa. St., 496, says: "The evidence must be clear, precise and indubitable."

The mistake must be mutual and clearly proved.

Trenton Terra Cotta Co. vs. Shingle Co., 80 Fed. Rep., 46.

Burrus vs. Caskey, 100 Mich., 94.

Miller vs. St. L. & K. C. R. R. Co., 162 Mo., 424.

In Reese vs. Wyman, 9 Ga., 430, it was said:

"The conditions precedent to equitable interfer"ence with a written contract are that it be made
"to appear that the contract was different from what
"the writing exhibits, and that it does not truthfully
"appear by reason of fraud, accident or mistake.
"* * This jurisdiction will be exercised very
"sparingly and with great caution and only upon
"the clearest proof of the intention of the parties,
"and of the mistake or accident upon which it is in"voked."

See also McCartney vs. Fletcher, 11 App. D. C., 1.

In Dulany vs. Rogers, 50 Md., 524, it was said:

"It is incumbent, however, upon the party seek"ing to reform a written instrument, to show by
"conclusive proof that it does not embody the final
"instruction of the parties. Courts will not rectify
"it unless it is executed under a common mistake,
"both parties having done that which neither of them
"intended."

The mistake must be as to both parties. Conceding pro argumento, but not otherwise, that the evidence affords some slight ground for a surmise that Mrs. Fitzgerald may have believed that she had acquired a fee, there is absolutely no evidence as to what the grantors intended to convey.

"It does not follow as a mere question of law, that "because a written contract is not according to the "intention of one party, therefore it is not according "to the honest intention of the other party."

Martini vs. Christiansen, 60 Minn., 491.

A case very much in point is Parker vs. Vanhoozer, 142 Mo., 621.

The contention of Vanhoozer was that there was an arrangement between him and his stepmother (who at the time of the institution of the suit was dead) to the effect that she should have certain property for her lifetime only. By mutual mistake, it was contended, a deed had been executed by Vanhoozer, conveying the property in fee to his stepmother. Reformation of the deed was denied. The court said:

"The prima facie presumption is indulged that the "written contract or instrument expresses the ulti"mate intention and that all previous negotiations "and proposals have been abandoned. * * * *
"Both the agreement and the mistake must be made "out by satisfactory and clear evidence. * * * *
"It is a serious matter for courts to set aside instruments which have become muniments of title."

To the same effect are:

Whelen vs. Osgoody, 62 N. J. Eq., 571. Greene vs. Stone, 54 Eq., 387. Donaldson vs. Levine, 93 Va., 472. Thallman vs. Thomas, 111 Fed. Rep., 277. Pope vs. Hoopes, 90 Fed. Rep., 457. Balzer vs. R. R. Co., 115 U. S., 645.

In Baldwin vs. National Hedge and Wire Fence Company, 73 Fed. Rep., 574, it was held that mere inadequacy of price was not sufficient ground for presuming that an instrument conveyed more than was intended and reformation was refused. It was said that inadequacy of price was only one circumstance to be taken in connection with others. Conversely, we submit, payment of full price, if it was paid, is not sufficient ground for presuming that the deed in this case was intended to convey more than it expressed.

The Court of Appeals of New York, in Southard vs. Curley, 134 New York, 148, while disapproving a charge of the lower court to the effect that the mistake must be proved "beyond a reasonable doubt," reviews the leading cases in a large number of the States and deduces the rule that the proof must be clear, positive, and convincing.

No presumption arises against the appellants for failure to assert their claim earlier.

From 1869 to her death, in 1903, Susan Poulton was lawfully in possession of the property. There was neither the right nor the occasion to dispute her possession. Long prior to her death the grantors in the deeds had died. Appellant Lucy A. Cunningham testifies that she is the oldest living heir, and she was so young in 1869 that she scarcely remembers moving from the property in question. No imputation of laches and no presumption of acquiescence in the claims of the trustee, Taylor, can be held against appel-

lants for their failure to assert a claim immediately upon the death of the life tenant.

The deeds ought not to be reformed without all the parties in interest before the court.

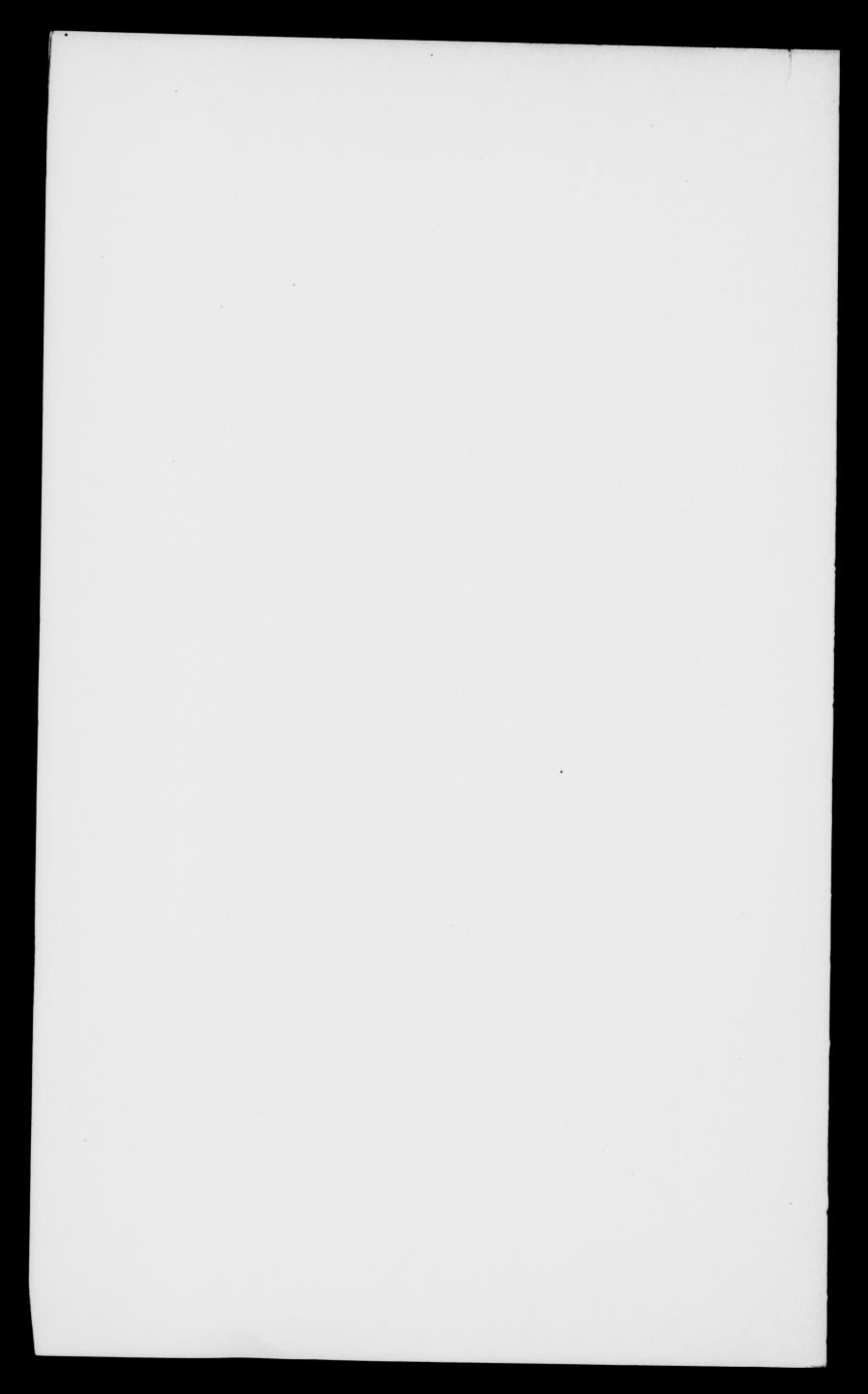
With reference to the seventh and last assignment of error, appellants suggest that the decree necessarily has the effect, as to the land conveyed by Susan Poulton to Kate Seligman, to prejudge and dispose of the rights of appellants as against said Kate Seligman without allowing them their day in court as against her and without reference to the verdict of a jury in a possible ejectment suit against her or those claiming under her.

For the considerations herein stated it is submitted that the decree below should be reversed.

Respectfully submitted,

W. W. MILLAN,
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Attorneys for Appellants.

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DISTRICT OF COLUMBIA FILED APR 22 1910

Honny W. Hodger.

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

APRIL TERM, 1910.

No. 2135.

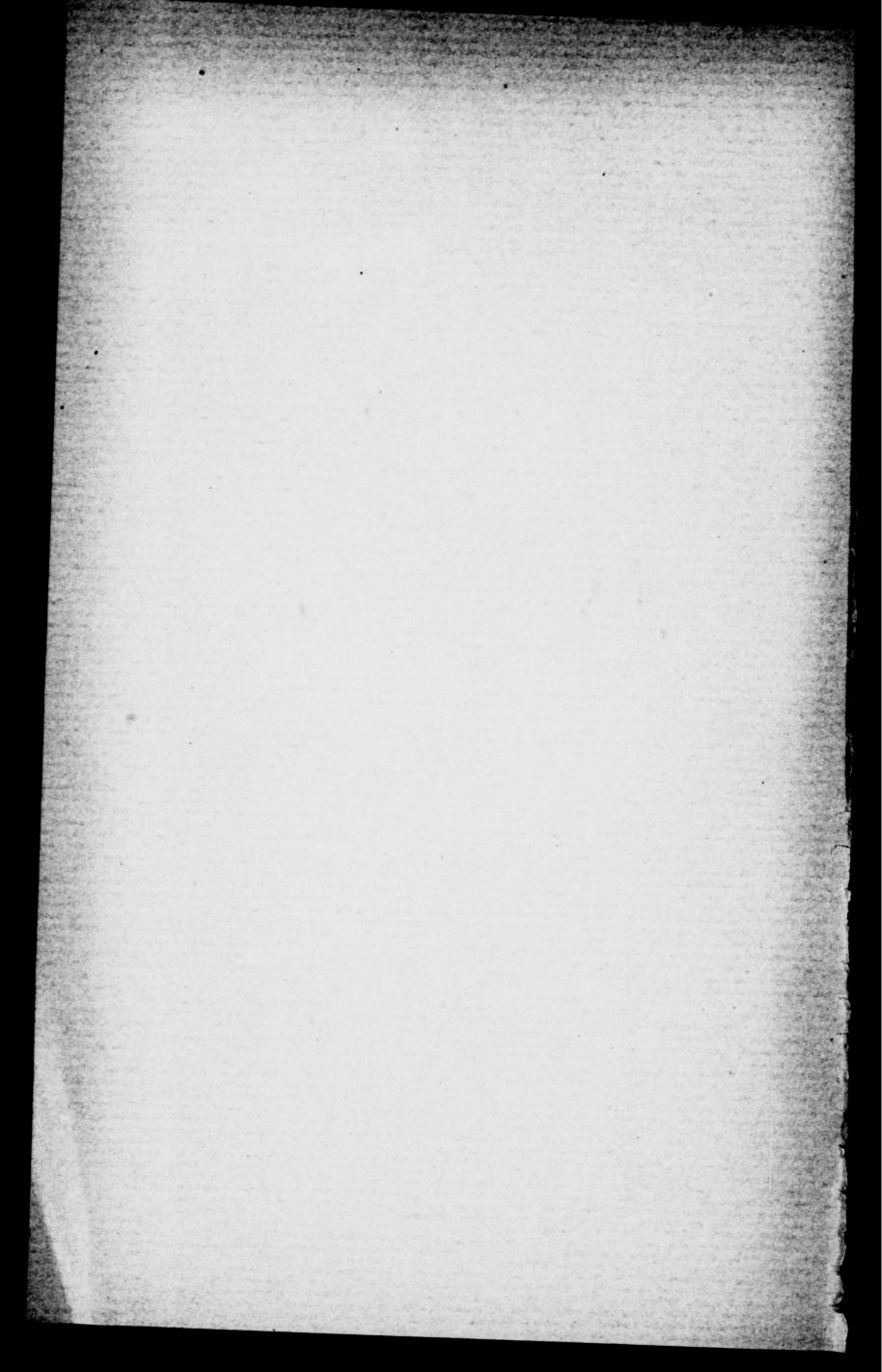
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BRIEF FOR APPELLEES.

PERCIVAL M. BROWN, CHARLES W. CLAGETT, Attorneys for Appellees



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BRIEF FOR APPELLEES.

Statement of Facts.

Appellees filed a bill in the lower court to reform certain deeds. The evidence shows that George M. Nichols and wife, on November 19, 1869, by deed conveyed certain real estate in this District to William F. Poulton, trustee, for Susan Fitzgerald, wife of Edward Fitzgerald. On the 19th of May, 1881, for the purpose of correcting an error of description in said deed, a second deed was made between the same parties, which was otherwise 3043-1

identical with the first. Both deeds were duly recorded. By these deeds (Rec., pp. 74 and 76) Nichols and wife conveyed the property in question to Poulton, as trustee for Susan Fitzgerald, wife of Edward Fitzgerald. Both deeds recited a consideration of \$4,000, and conveyed, in the granting clause, the real estate in question to the the said trustee—

"his heirs and assigns forever for the sole use, benefit and behoof of the said Susan Fitzgerald, and not subject to the control or disposal of her husband or liable for his debts."

In the habendum clause the deeds contain the following language:

"To have and to hold the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns, as trustee, as aforesaid of the said Susan Fitzgerald, to her sole use, benefit and behoof forever."

Nichols and wife by these deeds covenanted with the party of the second part (the trustee)—

"his heirs and assigns that they the said parties of the first part and their heirs shall and will warrant and forever defend the said piece or parcel of ground and premises and appurtenances unto the said party of the second part, his heirs and assigns from and against the claims of all persons claiming or to claim the same or any part thereof by, from, under or through them or any of them."

They further covenant that they-

"and their heirs shall and will at any and all times hereafter upon the request and at the cost of said party of the second part, his heirs and assigns, make and execute all such other deed or deeds or other assurances in law for the more certain and effectual conveyance of said piece or parcel of ground . . . unto the said party of the second part, his heirs and assigns, as said party of the second part, his heirs and assigns or his counsel learned in the law may advise, devise or require."

The real estate in question embraced a three-stroy brick house, and a one-story structure on Maryland avenue, and a vacant piece of ground suitable for building purposes in the rear of said house and running to C street (Rec., pp. 32, 33, 35, 38 and 39).

About two years (Rec., p. 66) after the purchase of the property Mrs. Fitzgerald erected a three-story brick house on the vacant part of the lot facing C street, at an expense of from \$2,200 to \$2,500 (Rec., p. 39).

In 1890 she conveyed the portion of the property so improved by a deed in fee simple for a consideration recited in the deed of \$5,150 (Rec., p. 82). Shortly after she acquired the property in 1869, she added a story to the one-story structure on Maryland avenue at an expense of five or six hundred dollars (Rec., p. 39).

While these improvements were being made, the grantors, Nichols and wife, frequently visited Mrs. Fitzgerald, who was then living upon the property, saw the buildings as they were being erected, and in no way intimated to Mrs. Fitzgerald that she only had a life estate in the property, but on the contrary Mr. Nichols stated that they were nice improvements and that he wished he had been able to make them himself (Rec., p. 67).

This property is situated on Maryland avenue, southwest, near Ninth street, and in 1869 the railroad passenger station was at the corner of the square. The railroad occupied Maryland avenue and created a great nuisance (Rec., p. 40).

In 1869 there was a grade crossing along the railroad and worse conditions existed than anyone could picture.

These conditions continued up to and after the time the Union Station was established (Rec., p. 31). In 1869 the entire property conveyed in trust to Mrs. Fitzgerald was not worth more than, if worth as much as, \$4,000, the consideration named in the deed, and \$4,000 was the full value for the fee simple title at that time (Rec., pp. 31 and 39).

Edward Fitzgerald, the husband of Susan Fitzgerald, died about 1866 (Rec., p. 33). On the 31st day of May, 1870, William Poulton, the trustee, conveyed the real estate by a fee simple deed to Susan Fitzgerald, the cestui que trust (Rec., p. 78). After the second deed of this property by Nichols and wife to Poulton, as trustee of Susan Fitzgerald, dated the 19th day of May, 1881, had been executed, Poulton, on the 21st day of May, 1881, conveyed said real estate to said Susan Fitzgerald in fee simple (Rec., p. 80). The deed of May 19, 1881, by Nichols and wife to Poulton was made to correct an error of description and the deed from Poulton to Susan Fitzgerald of the 31st of May, 1881, was made to convey the fee simple title to all the property to Susan Fitzgerald (Rec., p. 80). All the deeds referred to were recorded. The witness Poulton married Mrs. Fitzgerald about six years before the filing of this suit (Rec., p. 69).

On both occasions when Poulton went to Squire Clark's office to execute these deeds in fee simple, conveying the property to Mrs. Fitzgerald, both Mr. and Mrs. Nichols were present, and they did not in any way intimate that he did not have a right to convey the property to the *cestui que trust* in fee simple (Rec., pp. 64 and 65).

Witness was asked if George M. Nichols and wife knew that he was making a deed of this property in fee simple to Mrs. Fitzgerald on those occasions, and he replied, 'Yes, sir; I am satisfied that they did" (Rec., p. 65).

The deeds were all written by Squire Clark, a notary public and justice of the peace. Squire Clark, according

to the testimony of Mr. Judson T. Cull, was not competent to deal with the legal question involved in these deeds. In other words, he was legally incompetent to draw a deed of this character (Rec., pp. 55 and 56).

George M. Nichols died in 1885, and his wife died in 1890 or 1891 (Rec., p. 53). Susan Fitzgerald died on the 7th day of September, 1903 (Rec., p. 45). Susan Fitzgerald, as cestui que trust and afterwards as owner in fee simple, was in the absolute and undisputed possession of the property until the time of her death in 1903, and thereafter her trustee, James H. Taylor, was in absolute and undisputed possession of said property until the latter part of 1907 or 1908 (Rec., pp. 34, 35, and 46).

Although Mrs. Fitzgerald died in 1903 no claim was asserted by the heirs of Nichols until 1908, when upon a defect being discovered in the title, they were requested to execute quit-claim deeds (Rec., p. 46). All facts in connection with the conveyance of this property, and the testimony of all witnesses who could at this day be discovered, appear in the record.

ARGUMENT.

The deeds on their face show that it was the intention of all the parties to vest in the cestui que trust a fee simple title. In the granting clause the estate is conveyed absolutely to the trustee, in trust for the sole use, benefit, and behoof of Susan Fitzgerald, and not subject to the control and disposal of her husband. In the habendum clause the language clearly shows the intent of the parties to vest in Susan Fitzgerald a fee simple title. In this clause the property is conveyed to the trustee, his heirs and assigns, as trustee of Susan Fitzgerald, to her sole use, benefit, and behoof forever. The deed contains the usual covenants of a fee simple

deed, and as a matter of fact the scrivener attempted to draw a deed of trust upon a fee simple blank. By these covenants the grantees undertake for themselves, their heirs and assigns, to warrant and forever defend the real estate to the party of the second part, his heirs and assigns; and further covenant for themselves and their heirs that they will execute such other deeds unto the party of the second part, his heirs and assigns, as the party of the second part, his heirs and assigns, may require.

It is shown by the testimony of Mr. Judson T. Cull, an expert in real estate law, that the scrivener, Mr. Clark, was a justice of the peace and notary public, but was not a lawyer. That he knew Mr. Clark's knowledge of the law and his lack of knowledge of it, and that he was not qualified to prepare such a deed. That the deed was drawn on a blank intended for a fee simple instrument, and was not a proper blank to use for this purpose, but that Mr. Clark attempted to convert it into a deed in trust (Rec., pp. 56 and 57).

It is shown that the consideration in the deed, \$4,000, was the full value at that time for the fee simple title to the property (Rec. pp. 39, 30, 42, and 44). It is shown that shortly after Mrs. Fitzgerald acquired the property in 1869, she constructed on the back of the property, a three-story brick dwelling, which was erected at a cost of from \$2,200 to \$2,500, and which she conveyed in 1890, by a fee simple deed, duly recorded, for the sum of \$5,150, as recited in the deed (Rec., p. 82). It is shown that shortly after she acquired this property she built an addition to one of the houses on the front of the property costing from \$500 to \$600. It is shown that both the grantors, Nichols and his wife, frequently called upon Mrs. Fitzgerald, who was living on the property while these buildings were being erected, and never suggested to her that she only had a life estate in the

property, but on the contrary said to her that they were nice improvements that they wished they had been able to have made them (Rec., p. 66). And it is shown that when the trustee in 1870, and in 1881, deeded the property in fee simple to Mrs. Fitzgerald, both the grantors were present in Squire Clark's office, and raised no objection (Rec., p. 66).

In Walden vs. Skinner, 101 U.S., 577, the court said:

"Decisions of undoubted authority hold that where an instrument is drawn and executed that professes or is intended to carry into execution an agreement which is in writing or by parol, previously made between the parties, or which by mistake of the draftsman either as to fact or law does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement, the reason of the rule being that the execution of agreements, fairly and legally made, is one of the peculiar branches of equity jurisdiction, and if the instrument intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if the party had refused altogether to complete their engagement, and a court of equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case as well as in the other, by compelling the delinquent party to perform his undertaking according to the terms of it and the manifest intention of the parties."

See, also, note to American and English Annotated Cases, volume 3, page 444, and note to Lawyer's Reports Annotated (new series), volume 8, page 66:

"Deeds have to be construed the same as other contracts. The court so far as it can will put itself in the position of the parties and ascertain

their intention from the words used, their context, and the surrounding circumstances."

Shinnecock, etc., Co. vs. Aldrich, 116 N. Y. S., 534.

Darling vs. Alexander, 114 N. Y. S., 335.
Brown vs. Reeder, 108 Md., 657.
Simonds vs. Simonds, 199 Mass., 557.
Smith vs. Lindsey, 37 Penna. Sup. Ct., 173.
Williams vs. Grimm, 112 S. W. (Ky.), 840.
Dickson vs. Van Hoose, 47 S. (Ala.), 720.
Cotting vs. Boston, 201 Mass., 100.

Where a deed is of doubtful construction, the construction given by the parties themselves as shown by their acts and admissions, will be deemed to be the true one unless the contrary be clearly shown.

U. S. vs. Irwin, 57 U. S., 513.

If it plainly appears from the terms and conditions of the deed itself, the purpose for which it was designed to subserve, and the circumstances under which it was executed, that the intention was to convey the absolute estate, such an estate will pass without words of limitation.

> Merritt vs. Disney, 48 Md., 344. Hawkins vs. Chapman, 36 Md., 83. Higinbotham vs. Burnett, 5 Johns. Ch., 184. Ewing vs. Shanahan, 113 Mo., 195.

In Hine vs. McDaniel, 105 Ga., 322, land was conveyed to D., her heirs and assigns, to have and to hold to said D. and to others made equally as heirs, her heirs and assigns in fee simple.

The court said:

"Shall the real intention of the grantor, as manifested by the deed, be respected by the court or shall it be ignored in a literal and rigid

enforcement of the old rule. We can not see any sound reason why any different rule of interpre tation of words in the deed should prevail from what we ordinarily give in contracts. The rigid rule of construction that once prevailed in regard to such instruments is fast giving place to a more liberal one which does not hunt up technicalities in the law that often result in defeating the intention of the parties."

See, also-

Fisher vs. Fields, 10 Johns., 505. Clapp vs. Byrnes, 3 App. Div. N. Y., 287.

The court can resort to parol evidence to ascertain the intent of a party to a deed and to throw light upon its meaning.

C. & O. Canal Co. vs. Hill, 15 Wall., 94.
 Powers vs. Hibbard, 114 Mich., 555.

The deeds in this case contain appropriate terms to make them deeds of bargain and sale. Being deeds of bargain and sale, the statute of uses (27 Hen. VIII, ch. 10), which provides that any person having any use in land should be actually seized of the legal estate of the person seized to his use, vests the estate in the bargainee.

As said by Mr. Chief Justice Alvey in Brown vs. Renshaw, 57 Md., 67:

"By long settled construction an estate can not be conveyed to one by bargain and sale to the use of another because the bargainor himself is seized to the use and consequently the use of the bargainee is the first use and attracts the statute and exhausts its operation to the extent of the estate limited."

See, also, Ware vs. Richardson, 3 Md., 505.

And this is so even though the word "heirs" is not used.

Fisher vs. Fields, 10 Johns., 505.

The statute of uses in this case immediately upon the execution of the deed, or in any event immediately upon the death of Mrs. Fitzgerald's husband in 1866, transferred the entire estate granted to the trustee, to the cestui que trust.

Estoppel.

The conduct of Nichols and wife in reference to this property operates as an estoppel against their heirs.

In the case of Morgan vs. Chicago, etc., R. R. Co., 96 U. S., 716, the court said:

"The appellee insists that the record discloses an estoppel in pais, and that appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an important one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken shall not be heard to speak when he ought to be silent. He is not permitted to deny a state of things which, by his culpable silence or misrepresentation, he has allowed another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage."

In the above case the plaintiff, who was an employee of the railroad company, conveyed to the railroad a strip of land fifty feet on each side of the center of the road. Thereafter he made a plat of the surrounding land, on which he laid down a strip of land 200 feet in width on each side of the road. Thereafter the railroad company had a plat made of its properties for its own use, for

the purpose of ascertaining the land owned by it. The appellant Morgan frequently saw this plat while it was being made and never suggested that it was incorrect, and he allowed the railroad company to build upon the land. He was held to be estopped to assert title to the land as laid down on the plat.

To the same effect is Kirk vs. Hamilton, 102 U.S., 68. Appellants assert that the questions involved in this case have already been decided by this court in the case of Dengel vs. Brown, 1 App. D. C., 423.

The facts of the two cases are entirely different. Dengel vs. Brown was an appeal from a judgment in an action of ejectment. The deed in question had nothing on its face to indicate an intention to convey to the cestui que trust any greater estate than one for life. In drafting a deed in trust to secure a life estate it is proper to convey to the trustee the fee simple title, as otherwise, in the event of his death before the cestui que trust, there would be no one to hold the legal estate. It does not appear that any evidence was offered in Dengel vs. Brown to show that there was a mistake in the deed, and that the intention was to convey a fee simple estate to the cestui que trust, and in any event this evidence would not have been admissible until the deed had been reformed by a court of equity.

In the case at bar the deed bears on its face intrinsic evidence of an intention to convey to the cestui que trust a fee simple estate, and the evidence establishes that through the mutual mistake of the parties and the ignorance of the scrivener this was not done. The bill in this case was filed to reform the deed to make it comply with the intention of the parties and makes an entirely different case.

Respectfully submitted.

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